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# THE BRIEF

WITH

## SELECTIONS FOR BRIEFING

BY

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**TO**  
**H. L. E.**  
**PUPIL AND FRIEND**





## PREFACE

ASIDE from its primary purpose, as set forth in the definition of the term itself, the Argumentative Brief serves a distinctly disciplinary end. Experience in the college classroom, extending over nearly a score of years, has demonstrated to the compiler of the following pages that the analysis demanded by the process of brief-construction develops in a very high degree careful and logical methods of thought on the part of the student. To provide material suitable for exercise of this character and to set forth the principles underlying the brief as a form of composition, this work has been prepared.

Acknowledgment is hereby made to the publishers who have courteously allowed the use of copyrighted material; and also to various authors of textbooks on argumentation — particularly to Professors Baker and Foster, who have placed under deep obligations all subsequent writers on any branch of this extensive subject.

C. L. M.

WILLIAMS COLLEGE,  
WILLIAMSTOWN, MASSACHUSETTS,  
*February 10, 1916.*



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# THE BRIEF

## I

### THE ARGUMENTATIVE BRIEF

**Introductory.** The idea of the *plan*, or *outline*, is not new to the student of composition. Insistence upon a preliminary draft of the main points as a basis for subsequent elaboration into theme, essay, or oration has become a recognized convention of classroom practice.

The practical value of this preliminary outline is hardly to be overestimated. The unsatisfactory results following from failure to prepare a bird's-eye view of the field, especially among public speakers, are familiar to all. A voluble orator, a fluent writer, frequently begins his work with a vague conception of the proposition that he wishes to advance or to defend; by a series of thought-associations he wanders easily from point to point; he unconsciously diverges farther and farther from the original issue; and ultimately he reaches a goal wholly foreign to the theme with which he originally set out. After faithfully listening to an oration or after reading an article of this character, it is by no means an uncommon experience to ask ourselves honestly what it is all about, and, perhaps, to assume blame for want of understanding or lack of attention. The fault, however, may resolve itself into failure on the part of the composer to organize his material into logical order, with the result that unity and coherence have gone by the board. On the other hand, it is generally recognized, especially among masters of homiletic composition, that an effort based on careful preliminary analysis

secures a permanence in the mind of the auditor that cannot be secured otherwise. Many a sermon characterized by all the graces of rhetoric and masterly delivery, yet lacking in logical structure, produces seemingly deep effect; but it leaves little permanent impress an hour after the speaker's voice has ceased. On the contrary, a discourse that has been deliberately planned and earnestly presented is likely to remain a lasting memory and become a vital possession to its hearers.

There is a rather general prejudice to the effect that the deliberate ordering of material in advance is fatal to the best interests of persuasion or conviction. Speaking of an enthusiastic student in one of our theological seminaries who was disposed to reduce all of his trial-sermons to analytical form, the instructor in homiletics remarked: "E—— is a good man, but he labors under the illusion that he can brief the love of God." The reply was to the point: "But is there any reason why he should not be able to brief *what he has to say about the love of God?*" A surprise is in store for one who carefully examines the great masterpieces of forensic and pulpit oratory: the extent to which they reveal careful coördination and systematic ordering of matter is noteworthy. It may be safely asserted that the effectiveness of a writer or a speaker will be greatly increased if he has, in advance, a definite and orderly conception of his thesis and of the successive steps whereby he proposes to establish it, — whether by exposition or by the processes of proof.

**The Brief defined.** The term *brief* is included within the term *outline*, but is not synonymous with it. All briefs are, in a sense, outlines; but all outlines are not briefs. The brief possesses certain distinctive properties that differentiate it from the generic term under which it is included.

Professor Henry S. Redfield, in his exposition of *The*

*Brief on Appeal*, has defined the term as it is used in legal practice, and his definition may well serve here as a basis for exposition. With slight modifications and with the omission of technicalities, the definition of the legal instrument is as follows: "A brief is a document, prepared by counsel for the use of the court as a basis for oral argument of a cause; it contains a statement of the manner in which the questions in controversy arose, of the facts of the case so far as they relate to these questions; it is an outline of the argument, consisting of the propositions of law or fact to be maintained, the reasons upon which they are based, and citations of authorities in their support."<sup>1</sup>

With slight modifications this technical definition of the legal instrument may be adapted so as to cover the form of the brief used for general argumentative purposes, or, as it is sometimes termed, the forensic brief: thus, *A brief is an argumentative outline constructed for the purpose of acquainting the reader with the facts of the case under discussion. It contains the exact issues involved, the successive contentions that are to be maintained, and the reasons or the authorities upon which the contentions are based.*

**The Fundamental Qualities of the Brief.** A consideration of these definitions at once suggests several fundamental qualities of this form of outline composition.

(1) To begin with, one observes that in legal practice the brief is prepared *for the use of the court*. In fact, the lawyer considers his brief as a means of minimizing the labor of the court in the examination of the records and of enabling the court to understand the contentions of counsel. In general, it is the aim of the legal brief to put the court in possession of such information as shall enable it to act intelligently with reference to matters of law and of fact upon which its judgment must rest.<sup>2</sup>

<sup>1</sup> *Brief-Making* (The West Publishing Company), p. 219.

<sup>2</sup> *Ibid.*, pp. 220-21.

This characteristic of the brief the ordinary student is very prone to overlook: the fact that he is preparing his brief not for his own use, but for the information of another. The fundamental rule of a good brief, whether it be the lawyer's brief on appeal or the student's brief on an argumentative proposition, is that it shall present to another than its maker such matter as is essential to establish the contentions set forth. There is, of course, no reason why the maker of a brief should not make use of his own work, if he so desires. If, to clear his own mind upon some thesis that he has to support or to give him a more definite grasp of a theme upon which he finds himself called to address an audience, he regards the brief-form as a practical device, he is unwise if he does not take advantage of it; no other form of the outline is so thoroughly analytical as is the argumentative brief. Yet he should remember that in so doing he is bending to his own purposes a form of composition that is primarily intended to serve a different function.

And this same principle — that the brief is primarily intended for the enlightenment of another than its maker — carries with it the necessity of absolute clearness. But the final judge of its lucidity is not the writer who prepares it. He must therefore write in the light of the conviction or the appeal that his work is to convey to the reader. The maker of a brief is often prone to form the hasty conclusion that because his work is clear to himself it must be clear to another. He forgets that his study of the question has familiarized him with the steps of the proof, but that the result of his efforts is now coming for judgment before one who, it may be, has given the subject only casual attention or has perhaps never heard of it before.

The student of brief-making must, then, carefully distinguish between the brief and any form of outline that partakes of the nature of mere personal memoranda. For



example, we may imagine that the following notes, hastily jotted down, might have served Lincoln as a convenient reminder of the matters that he wished to develop in the course of his famous Springfield speech in 1858: —

- (1) "A house divided against itself"
- (2) Tendency toward nation-wide slavery
- (3) 1854
- (4) State Sovereignty and the Nebraska Bill
- (5) Dred Scott
- (6) 1855
- (7) Lecompton struggle
- (8) Present crisis
- (9) "Framed timbers," etc., etc.

But unless one were already familiar not only with the events of the senatorial campaign of 1858 but also with the speech itself, what value would this series of data possess? It has not the elementary qualities of the brief.

(2) A glance at the definition further shows not only that the brief is constructed for another than the maker, but that its purpose is to acquaint the reader with "the facts under discussion," etc. This, of course, presupposes careful study of the question on the part of the maker of the brief before he undertakes his work. The importance of this preliminary study and analysis is well exemplified in the method of the lawyer, whose first task is, by the comprehensive and orderly mental arrangement of principles and facts, to ascertain a proper theory of his case.<sup>1</sup> This determination of his "theory" is of vital importance, for upon the issues thus determined he must try his case, and upon that same "theory" he must base his appeal, if appeal be necessary.<sup>2</sup> And similarly, in the preparation of the argumentative brief, one must establish in his reader's mind a clearly defined theory, proposition, or thesis, the successive steps of which the brief presents in orderly array.

<sup>1</sup> Elliott, *General Practice*, vol. 1, sec. 93.    <sup>2</sup> *Brief-Making*, p. 208.

(3) And, finally, the definition of the brief implies that in the treatment accorded the subject under discussion the proposition must be kept free from all that is extraneous to the issue. In oral presentation, departure from the issue is easy, and, consequently, the fallacies of ignoring and of begging the question are not uncommon. Clearness and directness, at the very outset, are fundamental qualities in successful brief-making. An obscure brief is a contradiction in terms. If the analysis of an argument does not enlighten the mind of the reader, whatever other title may be applicable, the work cannot be termed a "brief."

Three fundamental rules may, then, be deduced from the definition of the brief as set forth on page 3, to wit: —

1. *The brief must be prepared from the point of view of the reader; not from that of the maker.*
2. *The brief must be the product of thorough familiarity with the question and must be based on careful analysis.*
3. *The brief must be clear, and free from all digression.*

**Subdivisions of the Brief.** The legal brief has come to possess certain distinctive divisions in the ordering of material, so that to-day its form is quite conventional. Indeed, in some States the form is prescribed by law, as is also the case with many other legal instruments. In the typical legal "brief on appeal" one looks for the following well-defined stages, or subdivisions: —

1. The Title
2. The Preliminary Statement
3. The Statement of the Case (sometimes termed "The Facts")
4. The Specification of Errors
5. The Brief of the Argument

The general form of the argumentative brief, as it has been developed in practice, follows closely after the legal model. It contains —

1. The Title

2. The Preliminary Introduction
3. The Main Introduction
4. The Statement of Issues
5. The Brief of the Argument
6. The Conclusion

The Title. The general nature of the title of the legal brief may be seen in the following examples: —

COURT OF APPEALS  
STATE OF NEW YORK

---

DELEA KING AS ADMINISTRATRIX OF THE  
ESTATE OF WILLIAM MELBURY, DECEASED,  
PLAINTIFF-RESPONDENT

*vs.*

THE NEW YORK CENTRAL AND HUDSON  
RIVER RAILROAD COMPANY,  
DEFENDANT-APPELLANT.

SUPREME COURT OF IOWA  
DECEMBER TERM, 1907.

---

MARTIN C. TAPLEY,  
*Respondent,*

*vs.*

JONAS D. WESTLOCK,  
*Appellant.*

The Title, as here presented, serves the practical purpose of facilitating identification. It appears at the head of the brief, and is repeated in more or less similar form on the

last page, so arranged as to serve as the endorsement when the brief is folded for filing.

In furtherance of this same purpose of promoting convenience of identification for filing, reference; etc., the Title of the argumentative brief is but slightly different. It appears on the back of the last page only, and, like the title of a book, serves as an endorsement. For example: —

WILLIAMS COLLEGE

BRIEF OF AN ARGUMENT ON

*THE PARTICIPATION OF FRESHMEN IN INTERCOLLEGIATE  
ACTIVITIES*

WILLIAM D. SPENLOW, '16

January 24, 1916

**The Preliminary Statement and the Preliminary Introduction.** This division of the legal brief usually follows immediately after the Title. It states, in a concise paragraph, the general substance of the case at issue. It is phrased at full length, rather than in the abbreviated form that characterizes titles and general memoranda. The following preliminary statement is typical: —

This is an appeal from a judgment of the Appellate Division, Second Department, affirming a judgment of the Supreme Court, entered in the Hamilton County Clerk's Office, May 15, 1913, in favor of the Plaintiff, and against the Defendant for \$5000 damages, and \$161.40 costs, entered upon a verdict of a jury after a trial held at the March, 1913, term before Mr. Justice William W. Collins.

SPENLOW AND JORKINS,  
*Attorneys for Defendant.*

The corresponding division of the argumentative brief — the Preliminary Introduction — is but a slight modi-

fication of the Preliminary Statement as presented above. It serves to introduce the subject of discussion and to acquaint the reader definitely with the general matter in hand before he undertakes the rather elaborate introduction wherein terms are defined, extraneous matter cleared away, and the main issues unmasked. It therefore conveniently occupies a separate page, and serves the same purpose as does the title-page of a book. For instance:—

This is a brief of a speech by Senator Beveridge of Indiana, delivered in the Senate of the United States, January 9, 1900, in favor of the retention of the Philippine Islands by the United States, and presented in reply to a request from the Senate for the results of a personal observation recently made by the speaker in the islands of the Far East.

The advantage of this somewhat full, but certainly clear, Preliminary Statement is that, at the very threshold of his work, the reader finds his mind entirely satisfied as to the exact subject that the maker of the brief is about to discuss. It is no part of this Preliminary Introduction, however, to present any step of the argument, or even to clear any ground preparatory for the argument. It is simply explanatory, and serves no other purpose than to state in full all that is necessary for understanding the exact substance of the brief that follows.

**The Facts and the Main Introduction.** The third step in the legal instrument — the Facts, or the Statement of the Case, — is of the greatest importance. This portion of the lawyer's brief should contain "a clear and concise statement of what he claims to be the substance of the record . . . the substance of the pleadings, when questions arise upon them, and also the leading facts established by the evidence, where questions of fact are to be determined." <sup>1</sup>

<sup>1</sup> *Brief-Making*, p. 223.

So important is this portion of the brief in legal practice that failure to include it within the instrument is attended with various penalties, ranging from a reprimand to dismissal of the case.<sup>1</sup> Indeed, it is commonly asserted by lawyers that this division of the brief presents the actual crux of the whole presentation. What the court needs is not guidance upon the argumentative and legal aspects of the case submitted by counsel, but, rather, a lucid exposition of the facts. With these the court should be quite equal to the task of reaching a decision. "This is far more important than it appears to many lawyers, especially where a case is long and complicated, and where the facts, to be intelligible, must be extracted from a large mass of evidence and grouped together. To suppose the court will do for you what you will not do for yourself, and produce order out of chaos, is a great mistake. You must start with some clear and logical theory as to what the facts really are, for, if your facts do not commend you to the appellate court, it may look with some suspicion on your logical conclusions, however convincing they may be."<sup>2</sup>

An example of the Statement of the Case, as it appears in the legal brief, is presented on page 44.

The corresponding division of the argumentative brief — the Main Introduction — is similarly of the utmost importance, although it is probably of less relative significance, in this case, than the argumentative matter that follows. It is a recognized principle of argumentative procedure that, previous to all citation of evidence and the establishment of proof, terms shall be defined, facts necessary to an understanding of the demonstration set forth, and all unessential matter eliminated. Everything that is necessary to this clearing of the decks belongs to the Main Introduction. The various steps of this pre-

<sup>1</sup> *Brief-Making*, pp. 223-24.

<sup>2</sup> *Albany Law Journal*, October, 1889.

liminary analysis are thus specified by W. T. Foster in his *Argumentation and Debating* (p. 50):

1. The Origin of the Question (the immediate cause for discussion).
2. The History of the Question.
3. The Definition of Terms.
4. The Exclusion of Extraneous Matter.
5. The Exclusion of Admitted Matter.
6. The Exclusion of Waived Matter.
7. The Main Contentions of the Affirmative and of the Negative.

It is apparent that this portion of the brief is expository rather than argumentative. Its function is to set forth matter upon which both sides are in agreement, rather than to produce conviction upon contentions regarding which there is difference of opinion. It is also evident that there can be no argument upon the proposition at issue until there is common understanding between the opposing parties regarding the meaning of the terms of the proposition, as well as regarding the various other elements indicated by the steps of the analysis as presented.

The form in which the Main Introduction should be presented may be seen in the argumentative brief on pages 58-62.

**The Specification of Errors and the Statement of the Issues.** Upon the fourth main division of the legal brief, the Specification of Errors, it is not necessary to dwell at any great length. The exposition of its various details would lead to the consideration of legal technicalities quite beyond the scope of the present work. The principal consideration is that the specific "errors" alleged be set forth clearly and in due order, so that the court may, without difficulty, understand the underlying contentions.

In the argumentative brief the corresponding division, the Statement of the Issues, has much the same purpose

as the Specification of Errors: to present the main contentions underlying the case in dispute. The function of the last step in the Main Introduction, as shown on pages 61-62, — the presentation side by side of the affirmative and negative arguments, — is to arrive at the basic contentions upon which the argument is to be constructed after all preliminary matter has been cleared away. These fundamental contentions are set forth in definite form in the Statement of Issues. An example of such presentation will be found in the typical argumentative brief on page 62.

**The Brief of the Argument.** The Brief of the Argument is identical in the legal and the argumentative brief, with the exception already noted, that in the case of the legal brief there is a growing tendency to abbreviate this portion and to lengthen correspondingly the introductory portions wherein the facts are set forth for the illumination of the court. The main business of the Argument in the legal brief is to present, together with the facts or propositions open to discussion, the authorities cited by way of proof. In the argumentative brief the citation of authorities is much less extensive and less convincing than in the legal brief; the former contains the arguments that sustain the proposition under discussion, as well as those that through refutation destroy the contentions of the opposing side. A short extract from a brief of each type will illustrate the more "authoritative" character of the legal brief and the more detailed and "probative" character of the argumentative type.

*(From a Legal Brief)*

#### POINT FIRST

A general assignment without preferences will not be avoided at the instance of a particular creditor, and such creditor's claim preferred, even on proof that the debtor



fraudulently deceived the said creditor for the purpose of preventing a possible interference with his legitimate intention of distributing all his property ratably among all his creditors.

- (A) *General assignments without preferences are favored in the law.*

*Dombey v. Pipchin Card and Paper Co.*, 42 App. Div. 277.

- (B) *A domestic corporation may assign without preferences for the benefit of its creditors.*

*Bagstock v. Western Bridge Co.*, 123 N.Y. 654, 687.

*Carker v. Buckeye Knitting Co.*, 17 App. Div. 213.

*Bynsby v. Tox*, 37 App. Div. 299.

*Tumpkins v. Home Machine Co.*, 17 Misc. 142; 15 App. Div. 287.

Such an assignment was in effect forbidden by the provisions of the Revised Statutes prohibiting transfers by an insolvent corporation or in contemplation of its insolvency (5 R.S., sec. 675). These provisions were repealed by the Stock Corporation Law of 1904, which was amended in 1909 (sec. 67) in such manner as to sanction inferentially an assignment of this nature if made without preferences.

Perch on Corporations (3d edition) vol. III, pp. 123-456.

- (C) *It is the duty of the directors of a corporation which is insolvent to make a pro-rata distribution of its property among its creditors.*

Stock Corporation Law, section IX.

Code of Civil Proceedings, sections 2165-2651, 4316-6453.

*Farmer's Bank v. Skimpole & Co.*, 18 Misc. 664, at p. 376.

No argument is necessary to enforce this proposition. The principles of fair dealing require that the officers who have conducted a business so unsuccessfully as to induce a condition of insolvency should secure to the corporate creditors the remaining assets of the corporation rather than risk a further depletion of such assets by a continuation of the aforesaid business.

*(From an Argumentative Brief)*

I. In view of the differences of opinion that have arisen between Great Britain and the United States regarding the matter of discrimination in tolls on the Panama Canal, the question should be referred to the Court of Arbitration at The Hague: for

A. The Arbitration Treaty between the two countries, (a) by its terms and (b) by the circumstances attending its adoption, binds the United States to this method of adjudication: i.e.,

1. By its terms: for

a. It states that "Differences that may arise . . . relating to the interpretation of treaties existing between the two contracting parties . . . shall be referred to the Permanent Court of Arbitration established at The Hague."

2. By the circumstances attending its adoption: for

a. It was in large degree through the public declarations and the action of the United States that the arbitration treaty with Great Britain was brought about: for

(1) It was as a result of the address of Secretary of State John Hay to the nations of the world to enter into arbitration treaties with the United States that negotiations with the United States began.

(2) It was in response to resolutions adopted by Congress in 1890 that the treaty itself was finally negotiated: for

(a) In July, 1893, the House of Commons referred with satisfaction to the action of Congress and expressed entire concurrence in the idea of establishing arbitration relations.

**The Conclusion.** There remains only the Conclusion, or general summary, appended for the sake of showing

at a bird's-eye glance the entire field that has been covered. In legal briefs, as the main contentions are generally printed in more or less heavy-faced type, the main issues stand forth with sufficient distinctness, and the Conclusion is not necessary as one of the integral divisions of the instrument. In the ordinary argumentative brief, however, in which the issues often demand complex proof and in which refutation frequently plays an important part, it is convenient to tabulate, at the very end, the contentions upon which the demonstration rests. In certain instances where the argument is not extended and the main issues are sufficiently distinct, the Conclusion may seem needless, and its omission justifiable. The judgment of the brief-maker will determine this consideration. Here, as elsewhere, clearness must serve as the final test. Elucidation and simplification are the ultimate ends of all brief-drawing.

An example of the form that the Conclusion generally takes will appear in the typical argumentative brief presented on pages 75-76.

**General Rules of Brief-Construction.** In the drawing-up of the argumentative brief, three fundamental rules underlie all others.

(1) The first of these is to the effect that *All portions of the brief must be expressed in the form of complete sentences.*

This rule of construction arises from the fundamental principle of the brief itself, as expressed in the original definition (p. 3), that it is intended primarily not for the maker of the instrument but for the reader. It is an axiom of composition that a *proposition*, or complete statement, sets forth its core idea with less opportunity for misunderstanding than does a mere *term*, which presents, as it were, only the title of the idea. A proposition contains an exact

statement; a term merely sets forth a topic regarding which an infinite number of statements may be predicated. A term may connote to its author a perfectly definite line of thought, but to the reader this same term may convey nothing more than a vague idea, suggestive of no coherent line of reasoning. A comparison of the two passages following will at once demonstrate the superior definiteness of the form in which each division is expressed in the form of a complete proposition.

## (a)

- A. The abandonment of the Philippines by the United States an irretrievable blunder.
  - 1. Readiness of other powers to profit by their abandonment.
  - 2. Possibility of prompt abandonment.

## (b)

- A. The abandonment of the Philippines by the United States would prove an irretrievable blunder: for
  - 1. Every other great power stands ready to seize upon them, if they should be abandoned by the United States.
  - 2. Should retention, in the end, prove undesirable, the United States can, at any time, relinquish them under such conditions as may seem most wise.

The second arrangement leaves no latitude to the reader; he follows perforce the line of reasoning along which the mind of the maker of the brief has already traveled.

The only exception to this rule of complete statement may be found in those cases, partaking of the nature of exposition, wherein a statement is followed by a series of illustrations, authorities, instances, etc. For example:

- I. During the past fifty years various attempts have been made through temperance organizations to combat the liquor problem: for example,
  - A. The Woman's Christian Temperance Union (1874);
  - B. The National Temperance Society (1865);

- C. The Church Temperance Society (1881);
- D. The Anti-Saloon League (1895).

It would seem supererogatory to enlarge these sub-points into the fully predicated form, as no additional clearness would result. At the same time, the student should be on his guard against extended indulgence in the memorandum-like methods here illustrated. It is always safest to err on the side of clearness, and a habit of abbreviation is all too easily encouraged, with the attendant risks of vagueness and obscurity foreign to the very nature of the brief.

(2) The second general rule of brief-construction is: *The coördination and subordination of the several propositions contained in the brief are indicated by the varying widths of the margins assigned to the respective propositions and by symbols indicating the logical relations.*

This rule, like the first, arises from the character of the original definition. The brief is defined as containing "the successive contentions that are to be maintained, and the reasons or the authorities upon which the contentions are based." In this phrasing, the two terms "successive contentions" and "reasons or authorities upon which the contentions are based" imply the related ideas of coördination and subordination, very important considerations in the reasoning process: the "successive contentions" are coördinated one with the other, and the "reasons" of each contention are subordinated to the contention in question. If two statements are of equal rank they occupy similar positions on the written page, set off with equal margins; if one is subordinated to another, the subordination is indicated by carrying the dependent proposition farther to the right, so that it shall stand, as it were, under and within the contention to which it belongs. Furthermore, the relative logical rank is indicated by letters and

figures showing at a glance which contentions are parallel and which are inferior in logical importance. The following example will illustrate the application of the principles of margins and of notation:

PROPOSITION: *The United States should retain Possession of the Philippines.*<sup>1</sup>

I. The value of the Islands is so great as to render their retention by the United States a desirable policy: for

A. They occupy a strategic geographical position in the Pacific Ocean: for

1. They lie at the converging point of all the Pacific trade lines between America, Australia, and the Orient.

2. They bring the United States nearer to Asia and China than are the countries of Europe.

3. The trade of the Pacific, thus commanded by the Islands, must control, in great degree, the future trade of this country: for

a. Europe will soon cease to furnish the United States a market for its commerce: for

(1) Europe is every year manufacturing all that it uses and securing from its colonies all that it needs in addition.

b. The trade with China in particular offers immense possible opportunities to the commercial future of the United States: for

(1) China's foreign commerce in 1897 amounted to \$285,738,300, of which the United States secured less than 9% as against 50% that it might easily control.

(2) China's foreign commerce, great as it already is, is only in its infancy: for

(a) Its railway mileage is but a fraction of what it promises to become with the development of the country.

<sup>1</sup> From Senator Beveridge's speech in the United States Senate, delivered in 1900.

- B. The natural resources of the Islands render them invaluable: for
1. They abound in all the principal products of the tropics and of the temperate zones.
  2. They are covered with rich forests.
  3. Great deposits of copper and gold abound along their creeks and rivers.
- II. The retention of the Islands by the United States is but the acceptance of a moral obligation: for
- A. It is in accord with the manifest destiny of this republic: for
1. It presents a means of securing a better administration of the national government of the country: for
    - a. The effective administration of the Islands by the United States will constitute a stimulus that will react upon the administrative power: for
      - (1) It has already been demonstrated in the case of England in relation to India and Egypt that effective colonial administration acts as an inspiration to the home government.
  2. Just as self-government and internal development have characterized the first century of our national growth, so it is but reasonable to contend that the administration and development of foreign lands that have come into our possession will constitute the dominant note in the history of our second century of national life.

Makers of briefs often cause confusion in that, while attempting to secure clearness, they neglect to observe the importance of the margins. They make accurate use of symbols (I, A, 1, a, etc.), but they nullify the effect of the notation by using a single marginal space. That this at once minimizes all the effects of careful analysis will appear from the following version of one portion of the selection just cited:

II. The retention of the Islands by the United States is but the acceptance of a moral obligation: for

A. It is in accord with the manifest destiny of the republic: for

1. It presents a means of securing a better administration of the national government of the country: for

a. The effective administration of the Islands by the United States will constitute a stimulus that will react upon the administrative power: for

(1) It has already been demonstrated in the case of England in relation to India and Egypt that effective colonial administration acts as an inspiration to the home government.

A brief thus boggled does little toward enlightening the mind of the reader as to the course of the reasoning processes.

(3) A third general rule of the brief is: *Each step of subordination should be expressed by a suitable connective.*

This rule at once emphasizes the difference between the Main Introduction and the Brief of the Argument: that the one is, in large degree, expository in character, and the other argumentative. In consequence we find different connectives between the principal and the subordinate portions of the two divisions. In the Main Introduction these connectives are likely to be "as follows," "namely," "for example," and the like; for the subordinations generally present subdivisions, instances, or illustrations of the principal statements. The introductory portions of the various briefs presented hereafter (e.g., p. 59) indicate the use of expository connectives. In the Brief of the Argument, however, the case is otherwise. Here the principal statements consist of contentions that are supported by evidence. Consequently the natural connective is almost invariably "for." The process of reasoning is distinctly analytical, deductive, the fact preceding and the causes or reasons following. The selection presented on p. 18 illustrates the application of the rule in question.



This general rule as to the use of proper connectives is of the last importance. Forced to express in full the relations that bind together the successive steps of his reasoning, the maker of the brief cannot easily digress into loose analysis or fallacious reasoning. And this same use of connectives does not permit the attention of the reader to wander at large among the evidence cited: he is compelled to follow along the very lines of reasoning that guided the drafting of the argument.

In connection with the analytical, or deductive, nature of the brief, one may well note at this point a device whereby the logical ordering of an argument may be tested. Inasmuch as the brief proceeds from the *conclusion* down through the successive premises upon which it is based, if one begins with the ultimate cause, — i.e., with the argument *last* in order, — and proceeds upward, substituting the word “therefore” at each articulation indicated by the word “for,” one should find that the reasoning advances synthetically, or inductively, to the conclusion to be established. Not infrequently the application of this “reverse proof” will reveal a slip at some point where the logical processes do not properly adjust themselves.

An example of the application of this reversal of the brief order is presented in the following:

- A. The creation of the College Senate does not render unnecessary the further continuance of the Skull and Dagger Senior Society: for
  - 1. The object of the Skull and Dagger Society is separate and distinct from that of the College Senate: for
    - a. Instead of acting in a governmental capacity in regulating and controlling the relations between students and faculty, as is the case with the Senate, Skull and Dagger is advisory in character: for
      - (1) Its purpose is to urge all active steps possible for advancing the best interests of the College at large through undergraduate life: for

- (a) The constitution of the Society thus formally defines the purposes of the organization.

If one were now to begin with the last statement and reverse the line of reasoning by substituting "therefore" at each stage, the result would be somewhat as follows:

- A. The constitution of the Skull and Dagger Senior Society defines its purpose to be the urging of all active steps possible for advancing the best interests of the College at large through undergraduate life: *therefore*,
  - 1. This may be accepted as the purpose of the organization: *therefore*,
    - a. Instead of acting in a governmental capacity in regulating and controlling the relations between students and faculty, as is the case with the College Senate, the Skull and Dagger Society is purely advisory in its function: *therefore*,
      - (1) The Skull and Dagger Society is separate and distinct from the College Senate in its object: *therefore*,
        - (a) The creation of the College Senate does not render unnecessary the further continuance of the Skull and Dagger Society. (Q.E.D.)

Application of this process of "reversal" to the following brief will reveal flaws in the reasoning process that, at first reading in the original form, might escape attention:

- I. The contention that Mr. Douglas did not act in accordance with the principles of the Democratic Party in failing to support the English Bill is not to be maintained: for
  - A. The English Bill was, in fact, a pardon, in the form of a compromise, for those members of the Democratic Party who had sinned in opposing the Lecompton Bill, and
  - B. Mr. Douglas had no need of such pardon: for
    - 1. He was justified in his opposition to the Lecompton Bill on the ground of consistent adherence to the principle of state sovereignty.

- C. The English Bill differentiated between Kansas and other States seeking admission to the Union.
- D. The English Bill was in opposition to the principles underlying the national government: for
  - 1. Equality among the States is a fundamental principle of this government.
  - 2. Such use of the Federal power as was justified by the English Bill would be prejudicial to the South: for
    - a. There was, in Congress, a majority against the South.

The reason for the analytic, or deductive, ordering of brief-material is evident. If the brief were to be constructed on the synthetic, or "hence-therefore" principle, the composition would, indeed, be entirely logical and coherent, yet the principal steps of the main argument would be thrown into positions of greatest insignificance, and the ultimate purpose of the brief would be defeated.

**Special Rules of Construction.** In addition to the preceding general rules there are several specific rules that concern various details of brief-construction.

(1) *The Main Issues, constituting the fourth principal division of the argumentative brief (p. 7), reappear as the principal subdivisions of the Main Argument.*

They thus serve to keep prominently before the reader the principal contentions upon which the maker of the brief is basing his argument. Reference to the typical brief on pages 62-73 will show the application of the principle.

(2) *Each subordinated statement should present a clear and definite reason establishing the contention to which it is appended.*

The following examples of faulty briefing will show the confusion that results from failure to observe this rule:

(a)

- I. We cannot argue that it is fair to cheat in examinations,
  - A. Simply because we do not believe in them, and
  - B. Considering the privileges granted us by the Board of Education,
    - 1. Whose standards are high, and
    - 2. Whose wish is for our welfare.
  - C. Furthermore, it is our duty to uphold the rules and regulations of the Board.

This specimen is mere chaos labeled with the symbols of a brief. There is no proper relation between the subordinated statements and the principal contentions. The writer, if he had any argument at all in mind, probably reasoned along some such line of thought as indicated below:

(b)

- I. Our personal disbelief in the principle of examinations is no sufficient excuse for dishonesty in passing them: for
  - A. Whatever be our personal opinions, we are under obligation to meet the rules and regulations of the Board of Education: for
    - 1. The Board has shown that it is desirous of our welfare: for
      - a. It has granted us many privileges.
      - b. It has established a high standard of work.

(a)

- I. Governor Johnson holds it to be his duty to sign the bill at present pending in California with reference to the exclusion of the Japanese from holding land: for
  - A. Action in this matter has become imperative: for
    - 1. Thirty years ago, when the present constitution of California was adopted, the people wished to prevent this immigration: for
      - a. That constitution declared the presence of foreigners ineligible to citizenship to be dangerous to the State.
      - b. The Japanese are ineligible to citizenship.

2. The people want this bill: for
  - a. The vote in the Senate was 35 to 2, and in the Assembly 72 to 3.

Examination of this attempt at briefing will show that it utterly fails to meet the rule regarding logical relations. The fact (1) that when the constitution of California was adopted thirty years ago the people of the State desired to prevent the immigration of the Japanese does not establish the major contention (A) that action in excluding the Japanese from holding land has become imperative at this time. Nor does the fact (b) that the Japanese are ineligible to citizenship establish the contention that thirty years ago the people of California wished to prevent further immigration. Readjusting these and other faults of the brief, one may perhaps secure a better representation of what the writer really had in mind:

(b)

- I. Governor Johnson of California is justified in favoring the bill now pending before the legislature of that State, whereby it is proposed to deprive the Japanese of the right to own land: for
  - A. The bill is in accord with the state constitution: for
    1. The constitution declares that the presence of foreigners who are (like the Japanese) ineligible to citizenship is a menace to the welfare of the State.
  - B. The people of California are in favor of the proposed legislation: for
    1. In the State Senate the vote was 35 to 2 in favor of the bill, and in the Assembly it was 72 to 3.

(a)

- I. The contention of the South that the Republican Party, by its policy and doctrines, is stirring up insurrection among the slaves is not to be maintained: for
  - A. It has never been possible to trace any uprising among the slaves to Republican instigation: for

1. Even the Southerners themselves have never attempted to fix any blame upon the Republicans.
- B. The contention that the John Brown raid and the Harper's Ferry affair were gotten up by the Republicans is untenable: for
  1. It has been proved that John Brown was a fanatic, and not a Republican.

In this case the violation of the rule is apparent mainly in the loose reasoning that characterizes the ordering of the thought. Aside from the general assertiveness of the brief, it will be noticed that A. 1. is practically contradictory of I: the contention that Southerners are unable to prove their charge against the Republican Party is scarcely refuted by saying that they have never attempted to bring such charge. A simplification of the brief will bring out more clearly the ideas that really underlie the writer's line of reasoning:

(b)

- I. The contention made by Southerners to the effect that the Republican Party, by its policies and doctrines, is stirring up insurrection among the slaves is not to be maintained: for
  - A. No actual evidence has been cited in support of this charge.
  - B. The charge that John Brown's raid was conducted under Republican auspices has no weight: for
    1. History has demonstrated the fact that John Brown was an irresponsible fanatic.

(3) *The use of "hence," "therefore," or other illative connective at once indicates faulty organization of material.*

The reason for this rule has already been indicated under the third of the general rules of the brief (p. 20). As the whole system of brief-ordering is based on the principle that first the main contention must be laid down, and then that the contention itself be established through the citation of evidence, the use of "hence," "therefore," and similar

connectives at once brings about a reversal of the brief-order. For example:

(a)

- I. The proposed law excludes "all persons" ineligible to citizenship from holding land: therefore
  - A. The bill does not specify the Japanese: hence
    - 1. The proposed law does not discriminate against the Japanese.

In the brief as here presented the matter included under 1 is, in fact, the principal contention, the point to be proved; and yet it is relegated to the position of greatest insignificance. The entire scheme of organization should be reversed, thus:

(b)

- I. The contention that the proposed legislation establishes discrimination against the Japanese is not to be maintained: for
  - A. The bill in question does not specify any particular nation by name: for
    - 1. By its own terms it excludes "all persons" who are ineligible to citizenship from the right to hold land.

The confusion resulting from the use of "hence," "therefore," etc., is particularly difficult to handle when the connective crops out in the very midst of a complex argument; in such cases there is not even the consistency of logical method that is found in the foregoing specimen, and the entire structure falls to pieces. If the reader will attempt to reorganize the following example of briefing into coherent and logical arrangement, he will realize the obstacle presented at the point where "hence" appears in the argument:

- I. Douglas's statement to the effect that Lincoln had charged the Dred Scott case with prohibiting the negro from be-

coming a citizen of the United States misrepresents Lincoln's position: for

A. Lincoln merely mentioned the following decisions of the Supreme Court in connection with the Dred Scott decision as indicating a conspiracy for nationalizing slavery, viz.:

1. That a negro cannot become a citizen: hence
  - a. Lincoln supposed that this decision had been rendered in order to prevent the negro from ever securing the rights of citizenship.
2. That taking a negro into territory where slavery is prohibited does not make him free.

(4) *Double notation should not be prefixed to a statement in a brief.*

The symbol prefixed to a statement is for the purpose of showing its coördination with statements of equal rank or its subordination to statements of superior rank. To affix two symbols to a statement would therefore seem to indicate the impossible situation that the proposition in question is coördinate with another proposition and at the same time subordinate to it. For example:

(a)

I. Shortening the college course to three years is unnecessary: for

A. Provision is already made for students who are unable to spend four years in college.

B. 1. One's educational career can be shortened at other points: for

a. It can be shortened in the preparatory school or in the professional school.

2. Either of these is better than to cut short the college course.

At the point marked B, the brief-maker evidently was conscious of the logical correlation between the provision already made for students and the possibility of



shortening the college course at various points. But as the matter has been ordered, there is a logical paradox at the statement B. 1. That one's education can be shortened at other points, as shown by the symbol B, is parallel with A, and yet, by the presence of the symbol 1, it is apparently subordinate either to A, or to some point coördinate with A, namely, with itself. Disregarding the assertive character of the argument, which is almost totally lacking in evidence, we may improve the general structure as follows:

## (b)

I. To shorten the college course from four to three years is unnecessary: for

A. Provision is already made whereby the college course may be completed in less than four years.

B. Other portions of one's educational career, such as the preparatory school or the professional school, can be cut short with less loss than would result from curtailing the work of the college.

(5) *When coördinated statements in a brief stand in contrast to one another, or in any suspended relation, the several related propositions constitute, in reality, a single compound argument, rather than a succession of equivalent contentions. In such cases the relation may be fittingly expressed by the use of the symbols A, A', A''; 1, 1', 1'', etc. For example:*

I. The contention that we should not consider the provision of the treaty relating to "equality" as intended to be interpreted literally is untenable: for

A. Although the treaty does not expressly confer upon the United States *sovereign* rights for the protection of the territory embracing the Canal, yet

A'. The omission of a clause to that effect is easily to be explained: for

1. The fact that neither party to the treaty enjoyed any title to the region to be traversed by the Canal precluded the insertion of such a clause.

In this case it is apparent that A is not complete without A', and *vice versa*. The advantage of the notation lies in the fact that the coördination and the unity of the two statements are both indicated, and at the same time it is possible to subordinate under either or both of the main statements such proof as may be required. This method of notation, however, should be used with discrimination. The tendency of beginners is always to over-use the A-A' type of ordering and to bind together in this compound relation arguments that are merely simple coördinations. The use of "although . . . yet," "whereas . . . yet," etc., will always supply a test showing whether the balanced method is properly selected.

(6) *Statements presented in proof of a contention should be, in turn, supported by proof whenever possible, or established by the citation of definite authority.*

The failure to observe the first part of this rule results in mere assertiveness, and the unsupported *ipse dixit* of the brief-maker is not likely to carry conviction. The extent to which the presentation of proof shall be carried must depend on the general character of the argument. In any case, however, the purpose of the brief is defeated when the reader, at the end of a division in the demonstration, still asks, "But why is this true?" Consequently it is always desirable, when possible, to carry the demonstration down to the point where the statements become axiomatic in character or may be fairly regarded as admitted matter. The following brief illustrates the case in point:

I. Experimental vivisection has resulted in practical benefit to mankind: for

A. It has brought to light many psychological facts: for

1. All the senses have been analyzed through experiments on living creatures, brute and human: for

- a. According to Leffingwell "It is the only way in which these facts can be ascertained."
- B. It has proved of great benefit to the medical profession: for
  - 1. It has discovered many needful remedies for otherwise fatal diseases, such as virus and anti-toxin.
  - 2. It has revealed to our great physicians the value of the human body.

This brief is characterized by pervasive looseness of reasoning; it would carry little conviction to one opposed to the cause of vivisection. At the point 1, under B, the reader is likely to feel considerable doubt as to how the discovery of virus and anti-toxin has proceeded from the practice in question, — a consideration fundamental to the entire argument. Furthermore, the reader will certainly balk at accepting the vague generalization stated in 2, under the same head; even were it clear what is meant by "the value of the human body," the assertion that its revelation is due to vivisection will need considerable elaboration.

The necessity for detailed proof is often met by the citation of authorities, but this is satisfactory and convincing only in so far as it is acceptable to the reader of the brief. Consequently the citation of an authority must be definite both as to the identification of the authority cited and as to the location of the opinion presented in proof. In the brief just quoted, for example, a judicious reader will give little weight to the statement regarding the analysis of the senses through experiments on living creatures unless he has some definite knowledge regarding Leffingwell, and the source of the statement quoted. Who is Leffingwell? Is he an unprejudiced authority? Is he capable of speaking authoritatively on this matter? Why is he alone cited in support of the argument? Where does he make any such assertion as cited in the brief? Unless the reader is satis-

fied on these and similar matters, the citation from Leffingwell might just as well be omitted altogether and the statement regarding the analysis of the senses made on the unsupported authority of the brief-maker.

An interesting example of the unsatisfactory presentation of authorities is contained in the following extract from a brief regarding the advisability of subsidizing our merchant marine:

I. The United States possesses all the manufacturing facilities necessary to establish a successful merchant marine: for

A. The United States can sell plates for steel ships at a lower figure than that at which England must buy them, *says an English expert*: for

1. He shows that the United States can make rails at Pittsburg, ship them across to England, pay railway and ocean freights, and even then undersell the English manufacturer.

B. *Francis Bowles*, recently, in the face of close competition from the leading shipyards of Great Britain and the Continent, was able to secure to the United States a contract of \$22,000,000 for two Argentine battleships.

II. The United States has the material for providing efficient seamen to man an efficient merchant marine: for

A. *A British marine officer has recently spoken favorably of our seafaring material*: for

1. *He has said*, "There are hordes of men in the United States of the calibre of such men as Peary and those engaged in the 'Frisco and New Bedford whalers."

2. *He has said also*, "There must be thousands of sons of Britishers and Scandinavians in America who have the 'call of the sea' in their blood, and who would take to the water like a duck if they had the scope."

III. The United States has the scientific marine knowledge to handle efficiently her own merchant marine: for

A. In a recent magazine article the following statements are made by *an authority on marine matters*, . . . etc.

The unsatisfactory argumentative character of the foregoing is rendered even more clear if one places beside it, by way of contrast, the following extract from a brief assailing the right of the United States to interfere in the affairs of the Congo Free State:

- I. The contention that international law would justify the United States in interfering in order to prevent alleged cruelties in the Congo Free State is not well maintained: for
  - A. That international law would condemn such interference both in theory and in practice will appear from the following considerations:
    1. It would condemn interference in theory: for
      - a. Wharton, on page 202 of his *International Law*, writes, "It is not permissible for one sovereign to address another sovereign on political questions pending in the latter's domains unless invited to do so."
      - b. Hengstler, in vol. 1 of the *California University Chronicle*, writes, "As long as the independence of states is a principle of international law, it cannot be perceived how the limits of legal intervention can be extended beyond the scope of the self-interests of the intervening state."
      - c. Lawrence's *International Law* lays down the following principle: "So prone are powerful states to interfere in the affairs of others, and so great are the evils of interference, that a doctrine of absolute non-intervention has been put forth as a protest against incessant meddling."
    2. It would condemn interference in practice as maintained by the United States: for
      - a. In the case of the Jews in Morocco in 1878 this country refrained from interference on the ground that such action would be improper, as shown in the letter of Secretary of State Evarts to the United States Minister at Morocco.
      - b. In the case of the Russian Jews in 1882 the

United States again refrained from interference on the same ground, as shown by the letter of Secretary of State Frelinghuysen to the United States Minister at St. Petersburg.

II. Interference by the United States in the affairs of the Congo Free State would be inexpedient: for

1. It would be opposed to the traditional policy of the Government: for
  - a. Washington in 1797 stated that "it must be unwise for us to implicate ourselves by artificial ties in the vicissitudes of European politics."
  - b. Monroe, in his message to Congress in 1823, wrote "Our policy in regard to Europe remains the same, which is not to interfere in the internal concerns of any of its powers."
  - c. Henry Clay in 1828 said: "The Government of the United States scrupulously refrains from taking part in the internal dissensions of foreign states."
  - d. In 1863 Secretary of State Seward maintained: "Our policy of non-intervention in the internal affairs of sovereign states has become a traditional one, which could not be abandoned without the most urgent occasion, amounting to a manifest necessity."
2. It is opposed to the present policy of the United States: for
  - a. With reference to the very question of the Congo Free State, President Cleveland, in 1885, made the following statement: "This reserve to give plenipotentiary powers to our delegates at the Berlin Congress was due to the indisposition of this Government to share in jurisdictional questions of remote foreign territories."
  - b. President Roosevelt, through Secretary of State Hay, in defining the grounds upon which this Government became a party to the Hague Convention, states: "Nothing

contained in the convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions, or policy, or internal administration of any foreign state."

(7) *One should not cite in support of a contention a statement\* that is, in reality, no more than a mere repetition of the contention under discussion.*

This rule follows from the preceding as a natural corollary: any violation results in adducing evidence that proves nothing; it presents the fallacy of arguing in a circle, without advancing the demonstration of the proposition. A single example will illustrate the principle:

- I. In opportunities for joining a fraternity the man of limited means is at a distinct disadvantage: for
  - A. In the selection of candidates, the fraternities must, of necessity, consider the ability of the candidates to meet expenses: for
    - 1. Outstanding debts, upkeep of chapter-houses, and the like render it necessary that the members shall be able to contribute their part toward the expenses of the organizations.

In this argument there is little progress from A to 1. Reduced to their lowest terms, these arguments amount to much the same thing, and it is quite possible to pass from I to 1 without making use of the intermediate step in A. Condensation into two principal statements would improve the logical analysis of the argument.

(8) *Each proposition contained in the brief should consist of but a single statement.*

This rule follows from the first of the general rules of brief-construction as a corollary, and the reason for it is

clear. In case a double proposition be followed by proof, the relation of the proof will not be evident; it may bear on one portion of the compound statement, or it may bear on another; in few cases would the proof apply with equal force to both clauses. An example will make the principle clear:

I. Douglas in his reply misrepresented Lincoln's position with reference to the Declaration of Independence, and deliberately garbled Lincoln's remarks contained in the Springfield speech: for

A. He represented Lincoln as maintaining that the Declaration of Independence conferred upon the negro absolute and complete equality with the white man: for

1. Although Lincoln had distinctly limited the equality of rights enjoyed by the negro,

1'. Yet Douglas quoted him as saying . . . etc.

In this brief the confusion of reasoning is evident. The writer in A, with its succeeding subdivisions, demonstrates Douglas's misrepresentation of Lincoln's attitude with reference to the position of the negro as defined in the Declaration; but it will be noted that because Douglas misrepresented Lincoln he did not necessarily garble one of Lincoln's speeches. Yet in the two final propositions the writer has evidently returned to the second idea contained in the original statement.

Closely allied to this same looseness of phrasing is that in which ambiguity arises from the presence of two predicates, one independent and the other dependent, so closely placed one to the other that the reader has difficulty in determining to which the proof belongs. An example of this faulty phrasing appears in the following:

I. The Democrats *maintain* that the Filipino *should have* immediate self-government: for

A. He is capable of it: for

1. All men are free and equal and endowed with equal powers.



In this case the presence of the two italicized verbs arouses some doubt as to whether the following proof is applicable to the one or to the other. In the one case the argument is to prove the statement that the Democrats maintain a certain position, a statement that would probably require no demonstration; in the other case, the argument presents the reason justifying the Democrats in their contention, a far more likely course of reasoning. Were the original statement to avoid the double predication in some such way as "The Filipino, according to the Democrats, should have immediate self-government," the ambiguity would at once disappear.

*(9) Care should be taken not to introduce into the body of a statement, as an essential part of it, a phrase or clause that should be subordinated as proof.*

(a)

I. All these laws were so framed as to depend one upon the other: hence

A. Being a part of a system of compromises, the Utah and New Mexico Bills cannot be considered as models: for

1. Even Judge Douglas himself did not use them as models when he drew up his Nebraska Bill.

Aside from the faulty coördination at the end of I, which ruins the articulation of the reasoning, the phrase "Being a part of a system of compromises" is, in reality, an argument in proof of the contention that the Utah and New Mexico Bills cannot be considered as models. The phrase should, therefore, be expanded into a complete statement and properly subordinated to the proposition of which it is a proof. The brief, expanded into proper form, would read as follows:

(b)

I. The contention of Douglas to the effect that the Nebraska Bill merely embodies the principles of the Compromise Bill

of 1850, of which the Utah and New Mexico Bills are but a part, is not to be maintained: for

A. The Compromise Bill of 1850 establishes no precedent for bills concerning territorial legislation: for

1. The system of compromises of which it is composed was intended merely to meet the peculiar exigencies of the moment: and
2. Judge Douglas himself, in framing his Nebraska Act did not use the Utah and New Mexico Bills as models: for . . . etc.

The following proposition from an undergraduate brief further illustrates the point under consideration:

The government has made a number of appropriations for the improvement of the Upper Mississippi, but of uncertain and varying amounts, thus adding an element of insecurity to the present situation.

The writer of the foregoing has merged into a single proposition both cause and effect, fact and demonstration. The core of the matter appears after the word "thus," and the ordering requires complete reorganization.

The illustration presented under Rule 8 also exemplifies the violation of this rule, for the statement that Douglas garbled Lincoln's remarks as contained in the Springfield speech may be regarded as evidence of the first portion of I, that he misrepresented Lincoln's position with reference to the Declaration of Independence.

*(10) Refutation should be so phrased as to present clearly the contention against which it is directed.*

It is always desirable, and often essential, that the maker of a brief distinguish between the constructive arguments whereby he establishes his own contentions, and the destructive arguments whereby he attacks the contentions of his opponent. And in attacking an opponent's position one must present the point at issue clearly

and fairly. With this end in view, a conventional form for the presentation of refutation has been developed: "The contention that (followed by the issue under discussion) is untenable: for . . ." etc. In this way the maker of the brief has the opportunity of presenting his opponent's position as fully and as clearly as need be, and of showing the ground of attack. The following specimen of briefing will illustrate the presentation of both constructive and refutatory arguments:

I. The treaty relations existing between the United States and Great Britain with reference to an Isthmian Canal preclude the United States from making discrimination in tolls between its own ships and those of Great Britain: for

A. The Clayton-Bulwer Treaty of 1850, by the circumstances attending its adoption, binds the United States to observe equality between the two countries concerned: for

1. The United States took the initiative in seeking to secure the treaty.

B. The contention that the United States is relieved of treaty obligations by the fact that matters relating to the coasting-trade are not of international but of peculiar domestic concern is not to be maintained: for

1. This contention has already been disproved in the case of the Canadian Canal question and the Treaty of Washington in 1871.

C. The contention that the clause in the treaty regarding equality of tolls is not to be interpreted literally, on the ground that it deprives the United States of the right to defend itself and to protect its own territory, is not to be maintained: for

1. Great Britain has already admitted the sovereignty of the United States over the Canal Zone: for

a. Sir Edward Grey in his note of November 14, 1912, has specifically so stated: for

(1) He writes, "After summarizing the circumstances, . . . His Majesty's Government does not question the

title of the United States to exercise belligerent rights for the protection of the Canal."

The beginner in brief-making is prone to state his refutation in the simple negative form, leaving the reader to infer the refutatory character of the proposition. For example, one might thus state B in the foregoing brief: "The United States is not relieved of treaty obligations by the fact that . . ." etc. This loose phrasing, however, is faulty in that (1) the maker of the brief must not leave the reader to form his own inferences as to what the brief *may* perhaps mean, but must make the character of all the propositions clear beyond question; and (2) it encourages a tendency to slight the explicit phrasing of one's opponent's position. The following brief thus violates the proper form of presenting refutation:

(a)

I. Governor Johnson of California is justified in signing the bill now pending in the State Legislature, excluding the Japanese from holding land within the State: for

A. The proposed bill is not unprecedented: for

1. At least three States in the Union have, in the past, enacted laws similar to that now contemplated in California.

B. The proposed law violates no treaty rights: for

1. It reads: "All aliens not entitled to citizenship may acquire real property to the extent of any treaty now existing between the United States and any other Government."

While the arguments marked A and B might be constructive arguments advanced by one supporting the action of Governor Johnson, yet those who are familiar with the discussion know that the two points in question contain, in reality, two of the principal contentions advanced by those who assail his position. Consequently the phrasing

should be changed so as to indicate that the two contentions are destructive rather than constructive; thus:

(b)

I. Governor Johnson of California is justified in signing the bill now pending in the State Legislature, whereby the Japanese are excluded from holding land within the State: for

A. The contention that the bill in question is unprecedented is not to be maintained: for

1. At least three other States have, without protest or objection, passed similar bills (see Governor Johnson's letter to Secretary of State Bryan, May 12, 1912).

B. The contention that the proposed bill is in violation of the treaty between the United States and Japan is not to be maintained: for

1. The phraseology of the treaty on the point in question is . . . etc.

(11) *In the Conclusion of a brief it is customary to present in order the main contentions, prefaced by the word "since," and to close with the proposition under discussion; thus:*

#### *Conclusion*

I. SINCE the United States possesses the necessary resources for successful competition with other nations; and

II. SINCE the United States has sufficient population from which to man an efficient merchant marine; and

III. SINCE the United States has sufficient trade in foreign markets to make a merchant marine profitable; and

IV. SINCE the United States Navy would be benefited by an increase in the merchant marine:

THEREFORE, the United States Government should establish by subsidation a Merchant Marine.

The various rules for the construction of the brief may be thus presented in tabular form:

#### *General Rules*

1. All portions of the brief must be expressed in the form of complete sentences.

2. The coördination and subordination of the several propositions contained in the brief are indicated by the varying widths of the margins assigned to the respective propositions and by symbols indicating the logical relations.
3. Each step of subordination should be expressed by a suitable connective.

### *Special Rules*

1. The Main Issues, constituting the fourth principal division of the argumentative brief, reappear as the principal subdivisions of the Main Argument.
2. Each subordinated statement should present a clear and definite reason establishing the contention to which it is appended.
3. The use of "hence," "therefore," or other illative connective at once indicates faulty organization of material.
4. Double notation should not be prefixed to a statement in a brief.
5. When coördinated statements in a brief stand in contrast to one another, or in any antithetical relation, the several related propositions constitute, in reality, a single compound argument, rather than a succession of equivalent contentions. In such cases the relation may be fittingly expressed by the use of the symbols A, A', A'', 1, 1', 1'', etc.
6. Statements presented in proof of a contention should be, in turn, supported by proof, whenever possible, or established by the citation of definite authority.
7. One should not cite in support of a contention a statement that is, in reality, no more than a mere repetition of the contention under discussion.
8. Each proposition contained in the brief should consist of but a single statement.
9. Care should be taken not to introduce into the body of a statement, as an essential part of it, a phrase or clause that should be subordinated as proof.
10. Refutation should be so phrased as to present clearly the contention against which it is directed.
11. In the Conclusion of a brief it is customary to present in order the main contentions, prefaced by the word "since," and to close with the proposition under discussion.

## II

### A LEGAL BRIEF

THE following <sup>1</sup> is, in part, a brief prepared by Mr. Charles E. Feirich, a member of the class of 1907 in the Chicago-Kent College of Law, in a brief-making contest conducted by the *American Law School Review*. Out of a large number of briefs submitted by students in various law schools, this was selected as the best, and was awarded first prize, — the judges being William T. Spear, Judge of the Supreme Court of Ohio; Joseph D. Moore, Judge of the Supreme Court of Michigan; and Edwin A. Jaggard, Judge of the Supreme Court of Minnesota. In the brief as here presented, only the main subdivisions of II in the Argument are given in full, as the general rules for the form and contents of a legal brief are sufficiently illustrated in the other portions retained.

### SUPREME COURT OF IOWA

DECEMBER TERM, 1907

GEORGE C. SMITH,  
*Plaintiff-Appellant,*

*vs.*

ARTHUR B. RUSSELL,  
*Defendant-Appellee.*

No. 365.

### Preliminary Statement

This is an appeal by George C. Smith from an order of the District Court of Oregon County, sustaining a de-

<sup>1</sup> From *The Brief and the Use of Law Books*, by William M. Lile, Henry S. Redfield, Eugene Wambaugh, Edson R. Sunderland, Alfred F. Mason, and Roger W. Cooley. By kind permission of the publishers, The West Publishing Company, St. Paul, Minnesota.

murrer to the amended petition in an action brought by said George C. Smith, on a note executed by Arthur B. Russell.

### Statement of Facts

The agreed facts, so far as they are material to this appeal, are as follows: On December 21, 1894, the defendant, Arthur B. Russell, in part payment of a debt long past due, executed and delivered to George C. Smith his note for \$300, due in two years from the date thereof. The note was payable "to the order of" George C. Smith. Smith lost the note, and it was found by R. N. Jackson, who, however, refused to give it up on demand. On May 15, 1906, Smith brought his action to recover the amount due on the note, and, as an excuse for his inability to produce the note, alleged in his petition that it was "wrongfully held by a third person." (Abs. p. 2.) The defendant demurred. (Abs. p. 3.) The demurrer was sustained, and on October 10, 1906, judgment was entered on the demurrer in favor of defendant Russell. (Abs. p. 4.)

From the judgment so entered, the plaintiff, on November 10, 1906, perfected his appeal to this court. (Abs. p. 5.) On March 28, 1907, this court rendered its decision, approving the ruling of the district court sustaining the demurrer, but remanding the case for new trial, with leave to the plaintiff to amend his petition. (Abs. p. 6.) The ten years prescribed by the Statute of Limitations, within which an action could be brought on the note, expired December 21, 1906. On April 2, 1907, plaintiff filed an amended petition, setting forth the facts in connection with the loss of the note, the demand therefor on Jackson, and Jackson's refusal to surrender it, and offered to indemnify the defendant Russell against any claim on account of the note in the hands of another person. (Abs. p. 7.) Defendant demurred to the amended petition on the ground that



the debt was barred by the Statute of Limitations. (Abs. p. 8.) The demurrer being sustained, the plaintiff appeals.

### Specifications of Error

The court erred in sustaining the demurrer to plaintiff's amended petition.

### Points

I. The defense of the Statute of Limitations must be specially pleaded, and cannot be availed of by demurrer, in an action at law, even though it appears on the face of the petition that the limitation prescribed by the statute has expired.

II. Where an amendment does not set up a new cause of action, or bring in any new parties, the running of the Statute of Limitations is arrested at the date of filing the original pleadings.

III. The Statute of Limitations is suspended during the pendency of an appeal.

### Argument

#### I

The defense of the Statute of Limitations must be specially pleaded, and cannot be availed of by demurrer in an action at law, even though it appears on the face of the declaration that the limitation prescribed by the Statute of Limitations has expired.

The defense of the Statute of Limitations was permitted by the court below to be interposed by a demurrer filed by the defendant, which demurrer was sustained. This was error, because in an action at law the Statute of Limitations must be pleaded specially if the defendant desires to avail himself of that defense.

“In actions at law, as contradistinguished from actions under the code, it has always been the established rule that if the defendant desires to avail himself of the Statute of Limitations as a bar to the demand in suit, he must plead the defense. He cannot demur to the declaration, even where it appears on its face that the limitation prescribed by the statute has expired, for the principal reason that thereby the plaintiff would be deprived of the opportunity of replying that the case was within some of the exceptions to the statute, or any other matter which would prevent the bar from attaching.”

13 Enc. Pl. & Pr. 200, citing

- Condon v. Enger*, 113 Ala. 233, 21 South. 227;  
*Huss v. Central R., etc., Co.*, 66 Ala. 472;  
*Smith v. Richmond*, 19 Cal. 476;  
*Bowman v. Mallory*, 14 Ind. 424;  
*Matlock v. Todd*, 25 Ind. 128;  
*Sleeth v. Murphy*, 1 Morris (Iowa) 321, 41 Am. Dec. 232;  
*Zane v. Zane*, 5 Kan. 134;  
*Hines v. Potts*, 56 Miss. 352;  
*McNair v. Lott*, 25 Mo. 182;  
*Allen v. Word*, 6 Humph. (Tenn.) 284;  
*Chicago City Ry. Co. v. Cooney*, 196 Ill. 466, 63 N.E. 1029;  
*Guntton v. Hughes*, 181 Ill. 132, 54 N.E. 895;  
*Thomas v. Morgan*, 96 Ill. App. 629;  
*Wall, Adm'x., v. C. & O. R.R. Co.*, 200 Ill. 66, 65 N.E. 632;  
*Renackowsky v. Water Com'rs.*, 122 Mich. 613, 81 N.W. 581;  
*Norton v. Kumpe*, 121 Ala. 446, 25 South. 841;  
*Huntville v. Ewing*, 116 Ala. 576, 22 South. 984;  
*Barclay v. Barclay*, 206 Pa. St. 307, 55 Atl. 985.

A few extracts are made from the opinions of the courts in some of the cases above cited, which will suffice to show the rule of law on this point.

In *Wall, Adm'x., v. C. & O. R.R. Co.*, 200 Ill. 66, 65 N.E. 632, the court said:

"From the face of the declaration it appears that more than two years elapsed from the time of the injury to the bringing of the suit, and it is insisted by defendant in error that therefore the action could not be sustained, and hence the defense of the Statute of Limitations could be made by demurrer. Mainly on this ground it is insisted that the trial court properly sustained the demurrer. In equity, where it appears on the face of the bill that the cause of action is barred by laches or the Statute of Limitations, the defect may be reached by demurrer to the bill. But the rule is otherwise in common law pleading. The defendant cannot demur to a declaration even where it appears on its face that the limitation prescribed by the statute has expired, because plaintiff would be thus deprived of the opportunity of replying and pleading any matter which would prevent the bar from attaching. The defendant must plead the statute if he wishes to avail himself of it."

In *Thomas v. Morgan*, 96 Ill. App. 629, the Appellate Court of Illinois discusses this question at length, citing many authorities from various jurisdictions. The court remanded the case for the error of the trial court in sustaining a demurrer to the declaration based on the Statute of Limitations, although the declaration showed on its face that the time allowed by the Statute of Limitations had expired.

In *Hines v. Potts*, 56 Miss. 346, 362, the court said:

"It is urged that this case is barred by the Statute of Limitations. We cannot express an opinion as to this, because the bar of the Statute of Limitations cannot be availed of by a demurrer to the declaration, even though the cause of action set forth may appear to be barred. The Statute of Limitations must be pleaded, so that the plaintiff may, if he can, avoid the bar by replying facts which prevent it."

In *Allen v. Word*, 6 Humph. (Tenn.) 284, the court said:

“The Statute of Limitations in a suit at law must be pleaded, and this whether the cause of action as stated appears to be barred or not; because the plaintiff may reply and prove a subsequent promise to pay the debt.”

In *Sleeth v. Murphy*, 1 Morris (Iowa) 321 (2d edition or reprint, vol. 1, p. 422), 41 Am. Dec. 232, in a Per Curiam opinion it is said:

“We feel controlled in this matter by the decisions of other courts on like statutes. It has been of late years invariably held that a Statute of Limitations must be pleaded; that a demurrer will not lie, although the lapse of a sufficient time between the accruing of the action and the commencement of the suit should appear from the face of the declaration.”

In *Matlock v. Todd*, 25 Ind. 128, 133, speaking of the Statute of Limitations, the court said:

“But we do not decide the question, for the reason that it is not properly before us. It is raised on a demurrer to the complaint, and it has been held by this court, that in suits at law, to make the statute availing, it should be pleaded.”

Extracts might be made from the opinions in the other cases cited to the same effect, but the foregoing clearly show that the rule is based on reason and appears to be invariably enforced by courts of the last resort. If the defendant in the case at bar desired to avail himself of this defense, he should have pleaded it in bar instead of demurring to the declaration, for by doing the former the plaintiff would have had the right to plead any matter which would take the case out of the Statute of Limitations.

It is, therefore, urged that the decision of the trial court should be reversed, because of the error of the trial court in allowing the defense of the Statute of Limitations to be raised by a demurrer.

## II

Where an amendment does not set up a new cause of action, or bring in any new parties, the running of the Statute of Limitations is arrested at the date of filing the original pleading.

(A) *An appellate court has power, in its discretion, to direct the trial court to allow an amendment to a declaration.*<sup>1</sup>

(B) *An appellate court will, in a meritorious case, allow an amendment to the declaration for the express purpose of saving the cause of action from the bar of the Statute of Limitations.*<sup>1</sup>

(C) *The amendment introduced no new cause of action; hence it relates back to the time of filing the original petition, and the running of the Statute of Limitations was arrested at that date.*<sup>1</sup>

(D) *The fact that the Supreme Court on the previous appeal sustained the finding of the lower court does not affect the question, because the Supreme Court directed the trial court to allow an amendment to be filed, which was done.*<sup>1</sup>

## III

The Statute of Limitations is suspended during the pendency of an appeal.

While many, if not all, of the States in the Union have passed statutes giving the party who has his judgment reversed in an appellate court a specified time within which to commence a new action, so as to avoid the bar of the general Statute of Limitations, it appears from the following extracts from decisions of the supreme courts of various States, that the general rule is that the Statute of Limitations is suspended during the pendency of an appeal from the judgment of the trial court:

<sup>1</sup> The extended citations and proof of these contentions, presented in the original brief, are here omitted for considerations of space.

In *Kirsch v. Kirsch*, 113 Cal. 56, 45 Pac. 164, an action to recover the possession of real property, the court said:

“The judgment entered in March, 1888, was appealed from by Mrs. Kirsch. In 1890, less than three years before the application for the order here appealed from, that judgment became final by affirmance in this court. The action was then pending until June, 1890, and, while it was pending, she could not acquire title by adverse possession, since, during the pendency of the appeal, all rights under the judgment were suspended.”

In *Fields v. Austin* (Tex. Civ. App.), 30 S.W. 386, an action by the guardian of minors to have land of their deceased father set aside to them, the trial court, in its findings of law, which were approved by the Court of Civil Appeals of Texas, said:

“I hold that appeal from the judgment of the County Court suspended the right of plaintiff to recover possession of the land until the case was reversed by the judgment of the Supreme Court, and that limitation had not begun to run until the rendition of the judgment of the Supreme Court.”

In *Clark v. Bay Circuit Judge*, 62 Mich. 355, 28 N.W. 894, an application for a writ of mandamus recalling the execution on a judgment rendered in an action of ejectment, the court said:

“The question now arises as to when the one-year limit prescribed by the statute begins to run. The relator claims it commenced at the date of the entry of the judgment, April 15, 1884, while the plaintiffs insist that the time was held in abeyance while the cause was removed to and pending in this court, and until the judgment of this court affirming the judgment below, which was of date April 15, 1885. It seems to me that the judgment intended by the statute is the final judgment in this case until April 15, 1885. . . . I think the time in this case should run from the fifteenth of April, 1885.”

In *Miller v. Gist*, 91 Tex. 335, 43 S.W. 263, it was held that during the time of an appeal the Statute of Limitations is suspended but not vacated.

See also:

*Nix v. Draughton*, 54 Ark. 340, 15 S.W. 893;

*Hesters v. Coats*, 32 Ga. 448;

*Williams v. Banks*, 19 Md. 22;

*Chouteau v. Rowse*, 90 Mo. 191, 2 S.W. 209;

*Martel v. Somers*, 26 Tex. 551.

This rule is based upon the soundest reason. It is elementary that when the Statute of Limitations has once commenced to run it will not ordinarily be stopped, except by the bringing of a suit in a court of competent jurisdiction. But when this suit is brought, what argument can be advanced for holding the Statute of Limitations in abeyance, during the trial of the case in the lower court, and then allowing it to run on again during the time the case is under consideration by the Appellate Court? Yet this would be the effect of holding that this case is barred by the Statute of Limitations. The plaintiff in this case originally had six years within which to bring his action on the promissory note, which six years expired September 4, 1906. The first petition by plaintiff's attorney was filed May 5, 1906, about four months before the time allowed by the Statute of Limitations expired. The decision of this court on the first appeal was rendered October 3, 1906. The filing of suit by plaintiff on May 5, 1906, certainly stopped the running of the Statute of Limitations. The case was then pending on trial and appeal from May 5, 1906, to October 3, 1906, or nearly six months. Now, if the Statute of Limitations is suspended during the pendency of an appeal, as the foregoing cases unite in holding, these six months during which the case was pending on appeal must be excluded in computing the time during which the Statute of Limitations actually did run. Since, therefore, the plaintiff had about

four months before his claim would be barred by the Statute of Limitations, when he filed his original petition, and the six months immediately following were consumed by the appeal of the case, it follows clearly that when the judgment of the Supreme Court was rendered, October 3, 1906, he still had about four months within which to sue, even if no amendment or new trial had been granted him, for the Statute of Limitations was suspended during the time the appeal was pending. In other words, so far as the Statute of Limitations is concerned, if plaintiff filed his suit within the time allowed by the statute, and an appeal was taken from the judgment of the trial court, he was entitled to be placed *in statu quo* after the decision of the Supreme Court, because the running of the statute is suspended during the time occupied by appellate proceedings. And this is indeed a just, as well as a necessary, rule. Very few cases are appealed which would not be barred by the Statute of Limitations in the event of a reversal by the Supreme Court, if the decision of the lower court in the case at bar be followed. A plaintiff might have an eminently just claim, but, by reason of an erroneous decision of the trial court, he might easily be deprived of it altogether, as there would be absolutely no advantage to be gained by appealing the case to a higher court, where justice might be done, because, even if such higher court decided in his favor, when he reentered the trial court he would find his claim barred by the Statute of Limitations. Thus, instead of the decision of the Supreme Court being superior to that of the trial court, the order is reversed and for all practical purposes the decision of the trial court is final, inasmuch as from the date of that decision the Statute of Limitations would again commence to run and would continue to run, notwithstanding the fact that an appeal was taken to the Supreme Court. But it is quite unnecessary to go further to show what great hard-



ship and confusion would result from so obviously wrong doctrine. Immediately upon the decision of the Supreme Court being handed down in this case, plaintiff, in accordance with that decision, filed an amendment to his petition and began a new trial, although he really had about four months still remaining before his cause of action would have been barred by the Statute of Limitations. It is, therefore, earnestly contended that the lower court was in error in holding that the plaintiff's cause of action was barred, and it is believed that this court will not do otherwise than to reverse the judgment of the lower court and remand the case with directions.

### Conclusion

In conclusion, the attention of the court is called to the three separate grounds hereinbefore laid down, any one of which, it is believed, will be sufficient to secure a reversal of the decision of the lower court. In brief, these grounds are:

I. The decision of the lower court should be reversed, because it was error to allow the defense of the Statute of Limitations to be raised by demurrer, the rule of law being that that defense must be specially pleaded if a party desires to avail himself of it.

II. The decision of the lower court should be reversed, because the amendment filed to the original petition did not set up a new cause of action, and the rule of law in such an amendment is that the running of the Statute of Limitations is arrested at the date of filing the original pleading.

III. The decision of the lower court should be reversed, because, at the date of taking an appeal from the first decision of the trial court in this case, holding that plaintiff's petition stated no cause of action, plaintiff still had about

four months, so far as the Statute of Limitations was concerned, within which to bring a new action; and the law is that the running of the Statute of Limitations is suspended during the pendency of an appeal. Therefore the four months above mentioned still remained to plaintiff within which to bring a suit, after the decision of the Supreme Court, sustaining the holding of the court below.

In addition to these grounds, the attention of the court is called to the proposition that if an appellate court decides that plaintiff's original petition states no cause of action, but, believing that plaintiff may have a meritorious cause of action, gives plaintiff the right to amend his petition and a new trial, such appellate court will not subsequently sustain a ruling of the lower court that the amended petition is barred by the Statute of Limitations, where the original petition was not barred, for to do so would be to deprive of efficacy its own previous ruling. On the previous appeal of this case, the Supreme Court gave plaintiff the right to amend his petition and a new trial. Appellee is now before the bar of this court, asking that it render void and of no effect its own previous ruling in the case. It seems reasonable to assume that plaintiff was given the right to amend his petition in order to avoid the necessity of bringing a new suit. If this had not been intended, the court would undoubtedly have stopped when it affirmed the finding of the lower court, and plaintiff would have been compelled to seek his remedy as best he could, possibly by a new suit. Instead of doing this, however, the Supreme Court went further and granted plaintiff the right to amend his petition and a new trial. When this right was granted by the Supreme Court it was obligatory upon the court below to see that it was not defeated. Both the letter and the spirit of the decision of the Supreme Court were disregarded by the trial court in holding that plaintiff's cause of action was barred by the Statute of Limitations.

Plaintiff was not given a new trial, but was thrown out of the lower court on the ground that his amended petition was barred by the Statute of Limitations. This, in effect, deprived him of the right to amend his petition, for, if his amendment had been properly allowed, it would have dated back to the commencement of the original suit, which was brought within the time prescribed by the Statute. If the cause of action was barred by the Statute of Limitations when the Supreme Court directed that plaintiff have another trial, the question may be asked: "Why, then, did not the Supreme Court simply affirm the judgment for the defendant?" Surely no object of justice could be furthered by having plaintiff amend his petition and begin a second suit, if his cause of action was already barred by the Statute of Limitations. In short, since the Supreme Court directed that plaintiff have the right to amend his petition and a new trial, it will see that such mandate is carried out by the lower court. The Supreme Court will not sustain any holding of the lower court by which justice is defeated or its order to the lower court is avoided or altogether disobeyed. To do so would be to relinquish its own authority in favor of the lower court. Plaintiff, immediately upon ascertaining the decision of the Supreme Court, amended his petition and began a second trial, and, under these circumstances, he is entitled to have a trial upon the merits of his cause of action.

It may be that defendant prefers to have this case decided upon some theory which prevents the real merits of the case from being considered; but this is not at all in accord with the tendency of great modern jurists, who use every endeavor to see that justice is done upon the merits of each individual case, and that no one may lose a righteous cause of action through a mere inadvertence, not in any way affecting the substantial justice of the case. In

the language of Circuit Judge Caldwell, in *McDonald v. State of Nebraska*, *supra*:

“There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice, which courts were created to uphold and enforce, were esteemed of minor importance, compared to the quibbles, refinements, and technicalities of special pleading. In that period, the great fundamentals of the law seemed little, and the trifling things great. The courts were not concerned with the merits of a case, but with the mode of starting it. And they adopted so many subtle, artificial, and technical rules governing the statement of actions and defenses — for the entire system of special pleading was built up by the judges without the sanction of any written law — that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than form, in which the justice and right of the case determines its decision, and not some technical error or mistake in the pleadings. In England to-day the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and what is meant by substantial right is a right going to the actual merits of the case. Such right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day, the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue.

Extreme sensitiveness to that emotion no longer avails to turn a suitor out of court, or to delay justice."

It is, therefore, most earnestly urged by counsel for appellant that in the light of the decisions above cited, and the manifest error of the lower court, both in allowing the defense to be set up by demurrer, and in holding that the cause of action was barred by the Statute of Limitations, this court will reverse the case with such directions as justice and the law may require, and give the appellant the benefit of a trial upon the real merits of the case.

Respectfully submitted,

CHARLES E. FEIRICH,

*Attorney for Appellant.*

# III

## AN ARGUMENTATIVE BRIEF

WILLIAMS COLLEGE

### BRIEF OF AN ARGUMENT ON THE SOLUTION OF THE LIQUOR PROBLEM

WALTER MILLS HINKLE, '14<sup>1</sup>

*June 10, 1914*

#### Preliminary Introduction

THIS is a brief of an argument supporting the proposition that the elimination of private profit will afford the best solution of the liquor problem.

#### Main Introduction

I. *The Origin of the Question*: The liquor question is just now exciting great interest throughout the United States: for

A. At present 46,000,000 people are living in prohibition territory. (*U. S. B. A. Yearbook*,<sup>2</sup> 1913; p. 249.)

B. A constitutional amendment to prohibit, throughout the United States, the manufacture, sale, and distribution of alcoholic beverages has been recently introduced into Congress, and is being agitated throughout the country. (*N. Y. Tribune*, June 10, 1914; p. 1.)

<sup>1</sup> By the kind permission of Mr. W. M. Hinkle.

<sup>2</sup> *U.S. Barkeepers' Association Yearbook*.

- C. At every election in those States in which there are local option laws there is a bitter fight in each district between the supporters of prohibition (no license; "Dry's ") and the opponents of prohibition (license; "Wet's ").
  - D. Between 1907 and 1914 a "temperance wave" essentially similar to that of 1850-1860, has swept over the country.
- II. *The History of the Question*: Since colonial days there have been various attempts to solve the liquor problem: e.g.,
- A. From 1635 to 1770 various Colonies passed laws to prevent the sale of distilled spirits. (*Textbook of True Temperance, 1911*; pp. 38-40.)
  - B. From 1846 to 1860 a great "temperance wave" passed over the country, and during that period fourteen States adopted prohibition. (Joseph Debar, *Prohibition, Its Relation to Good Government*; pp. 7-17.)
  - C. The following organizations have been founded for the purpose of combating the liquor problem: viz.:
    - The Woman's Christian Temperance Union (1874);
    - The National Temperance Society (1865);
    - The Church Temperance Society (1881);
    - The Anti-Saloon League (1895);
    - The Catholic Total Abstinence Union;
    - The Intercollegiate Prohibition Association;
    - The National Prohibition Party.

III. *The Definition of Terms* : For the purposes of the ensuing discussion the terms are limited and the question restricted as follows:

- A. The term "elimination of private profit" is taken to mean that, to all intents and purposes, the government, through suitable agencies, shall take control of the liquor traffic.
- B. This control of the liquor traffic shall be limited to the control of the retail distribution of liquor.
- C. The term "government," as here used, is interpreted to indicate the municipality, incorporated town or township, county, or other governmental unit by which licenses are issued under the present laws.
- D. The restatement of the question will, then, read: *The control of the retail distribution of liquors by the municipality, county, or other governmental unit by which licenses are issued under the present laws affords the best solution of the liquor problem.*

IV. *Waived and admitted matter* :

- A. At the present time (1914) there are ten States under the system of prohibition; twenty-three under local option and license laws; and fifteen under license laws but without local option. (*World Almanac*, 1914; p. 248.)
- B. In the territory of the United States where there is no prohibition, liquor can be sold only by a license granted under state law by the county, municipality, incorporated town or township. (*World Almanac*: as above.)
- C. The number of licenses that can be issued in proportion to the population is determined



absolutely by the State, which has full authority over the liquor traffic. (*World Almanac*: as above.)

- D. Licenses are taxed in every State that permits their issue, the tax varying from \$100 to \$1500. (*World Almanac*: as above.)

## V. *Clash of Opinion:*

- |   |   |
|---|---|
| <p>A. None of the methods heretofore advocated have been adequate to solve the liquor problem: for</p> <ol style="list-style-type: none"> <li>1. Prohibition has failed to solve it.</li> <li>2. Local option has failed to solve it.</li> <li>3. The license system with regulation has failed to solve it.</li> </ol>                               | <p>A. The methods of handling the liquor problem, heretofore advocated, have already partially solved the problem: for</p> <ol style="list-style-type: none"> <li>1. Prohibition has been extended over many States.</li> <li>2. Local option laws are in successful operation in many States.</li> <li>3. In license States strict laws regulate the sale and distribution of liquor.</li> </ol> |
| <p>B. The methods heretofore used in the attempt to solve the liquor problem are bound in the future to repeat their failures of the past.</p>  | <p>B. The methods heretofore used will tend to advance even farther the solution of the liquor problem, as they are more and more widely extended.</p>  |
| <p>C. The solution offered by the affirmative will furnish a fundamentally sound and intelligent basis for dealing with the liquor problem: for</p> <ol style="list-style-type: none"> <li>1. Governmental authorities will be able to take care of a definite and real social need, without that need's being debauched by greed of gain.</li> </ol> | <p>C. The solution offered by the affirmative is inadequate to deal with the liquor problem: for</p> <ol style="list-style-type: none"> <li>1. The government cannot supply a social need as well as can private enterprise.</li> </ol>   |

## THE BRIEF

- |   |  |
|---|--|
| 2. Direct governmental control of the distribution of liquor will be of great advantage to the community. | 2. Governmental control means increased opportunity for graft.             |
| 3. The solution offered by the affirmative is eminently practical.  | 3. The solution offered by the affirmative is impractical and inexpedient. |

## The Issues

- I. Are the methods heretofore advocated adequate to solve the liquor problem?
- II. Will these same methods avail to solve the problem in the future?
- III. Is the solution offered by the affirmative adequate to solve the liquor problem?

## The Main Argument

- I. None of the methods heretofore advocated have been adequate to solve the liquor problem: for
  - A. Prohibition has utterly failed to accomplish this end: for
    1. Its gains have proved fitful and erratic: for
      - a. Of the fourteen States (Connecticut, Delaware, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New York, Ohio, Rhode Island, Vermont) that adopted prohibition during the ten years following 1860, all save one (Maine) have given it up. (Joseph Debar: *Prohibition, Its Relation to Good Government*; pp. 8-15.)

- b. Three States (Alabama, Iowa, South Dakota) that have adopted prohibition since the sixth decade of the nineteenth century have given it up. (*Id.*)
  - c. Of the ten States that at present (1914) have prohibition, seven (Arkansas, Georgia, Mississippi, North Carolina, Oklahoma, Tennessee, West Virginia) have adopted it since 1907; two (Kansas and North Dakota) adopted it during the 80's; and only one (Maine) remains of the original fourteen that adopted it during the "temperance wave" of 1860-1870. (*World Almanac*, 1914; p. 248, and *Textbook of True Temperance*, 1911; pp. 68-69.)
2. Where prohibition has been embodied in law it has failed to prohibit: for
- a. It has failed in Maine: for
    - (1) In spite of prohibition, Portland has one saloon per 269 inhabitants; Augusta, one per 170; Gardiner, one per 274; Rockland, one per 171; Bangor, one per 100. (M. N. Clement, ex-Excise Commissioner of New York, *U.S.B.A. Yearbook*, 1911; p. 172.)
    - (2) In spite of prohibition, Portland shows one arrest per 24 inhabitants; Augusta, one per 110; Rockland, one per 21; Bangor, one per 18.

(*Textbook of True Temperance*; p. 126.)

- (3) The prohibition law is subject to constant violation with resulting evil consequences. (Major Holman F. Day, *The Muddle in Maine*, *Harper's Weekly*, both quoted in *U.S.B.A. Yearbook*, 1911, pp. 242-249; *Textbook of True Temperance*; pp. 106-108.)

b. Prohibition has failed in the Southern States: for

- (1) In Tennessee the law has proved a farce: for

(a) In the cities of Tennessee (Chattanooga, Memphis, Nashville) liquor can be readily obtained from "near-beer" saloons, "social clubs" formed for that particular purpose, etc. (R. E. Pritchard, *Failure of Prohibition in the South*, in *Harper's Weekly*, quoted in *U.S.B.A. Yearbook*, 1911; pp. 199-206.)

(b) Indictments in this State for violation of the law amount to nothing, the convicted escaping with light fines which are more

than recompensed by  
their enormous profits.  
(*Id.*)

(2) In Georgia the law has remained unenforced: for

(a) In the cities of Georgia (Atlanta, Mobile, Montgomery, and Savannah) liquor can be freely obtained from "near-beer" saloons, "social clubs," and small druggists ("boot-leggers"). (R. E. Pritchard, as above; John Kirk, *Encouraging the Moonshiner*, in *Harpur's Weekly*, quoted in *U.S.B.A. Yearbook*, 1911; pp. 217-220.)

(b) The number of licenses issued to druggists in Atlanta for the sale of alcohol since Georgia adopted prohibition (1907) has increased from 100 to 500. (N. W. Johnson, U.S. Internal Revenue Dep't., *Textbook of True Temperance*; p. 114.)

(3) Prohibition has similarly failed in Mississippi and

North Carolina. (See R. E. Pritchard and John Kirk as quoted above.)

3. The effect of prohibition has been to increase in prohibition territory the use of harmful substitutes for alcohol, such as cocaine and opium: for
  - a. The use of opium in Maine has steadily increased, particularly in the rural districts. (Dr. Hamilton E. Wright, *Textbook of True Temperance*; pp. 115-116.)
  - b. The use of opium and cocaine in the South has been steadily on the increase of late years, especially in "dry" territory. (Hugh C. Weir, *The Opium Peril in America*, in *Putnam's Magazine*, quoted in Joseph Debar's *Prohibition, Its Relation to Good Government*; pp. 102-105; also the Currier Commission, Judge Harris Dickson, of Vicksburg, Miss., and Bishop C. H. Brent, all quoted in *Textbook of True Temperance*, 1911; pp. 115-116.)
4. In spite of the fact that 46,000,000 people are now living in "dry" territory, the consumption of alcoholic liquors has increased in the United States from 6.43 gallons *per capita* in 1850 to 22.77 gallons *per capita* in 1911. (M. N. Clement, N. Y. ex-Excise Commissioner, *U.S.B.A. Yearbook*, 1911; p. 169.)

B. Local option laws have failed to solve the liquor problem: for

1. Local option is ineffective from its very nature: for
  - a. Liquor can easily be secured by those living in "dry" districts from adjoining "wet" districts.
  - b. The "dry" cities of Massachusetts show high records of arrests for drunkenness: for example,
    - (1) During the year 1905 "dry" Brockton had 284 arrests per 1000 inhabitants on this charge. (*Textbook of True Temperance*; pp. 132-135.)
    - (2) In 1907 there were in "dry" Cambridge a total of 1500 arrests for drunkenness. (*Id.*)
    - (3) In "dry" Worcester there were 135 arrests for drunkenness in July, 1908, and 220 in July, 1909. (*Id.*)
2. Local option works hardship to surrounding license districts: for
  - a. People flock to the license districts from the no-license districts when they wish alcoholic liquor, and are disposed to over-indulgence with the opportunity thus obtained.
  - b. In Boston, in the year 1907, of the 35,728 arrests for drunkenness 11,528 were those of persons coming from no-license districts in the vicinity of Boston. (*Textbook of True Temperance*; p. 131.)
- C. The license system with regulation has failed to solve the liquor problem: for

## THE BRIEF

1. The very fact that the liquor question is being violently agitated throughout the country is *prima facie* evidence that this system — that longest in use — has failed to give satisfactory solution.
2. By the system of license and regulation, the business of selling liquor is placed under unhealthy conditions: for
  - a. It is to the interest of the saloon-keeper to sell the maximum amount of liquor.
  - b. It is to his interest to permit his saloon to be used for immoral and illegal purposes: for
    - (1) He will naturally be impelled to pursue the course that will most quickly and easily increase his profits: for
      - (a) Profit is the goal for which he enters the business.
      - (b) On the analogy of seemingly respectable concerns which, nevertheless, adulterate their goods and otherwise deceive the public, the saloon-keepers will not be models of business virtue. (Chicago Vice Commission: *The Social Evil in Chicago* ; p. 130 *et seq.*)
  - c. Investigations of the saloons bear out this contention: for



- (1) An investigation by the N.Y. Vice Commission, carried on from January to November, 1912, shows that out of 794 saloons and concert halls visited 308 were found "disorderly." (*Commercialized Prostitution in New York*; p. 145.)
- (2) Of 445 saloons investigated by the Chicago Vice Commission, July to October, 1910, 236 were found "disorderly." (*The Social Evil in Chicago*; p. 122.)

II. The methods heretofore adopted in the attempt to solve this problem are bound, if continued, to repeat in the future the failures of the past: for

A. Prohibition is bound to fail: for

1. It is based upon fundamentally unsound principles: for

- a. It is an attempt by a majority to prevent a minority from exercising a form of individual liberty to which that minority believes itself entitled.
- b. It is a breeder of contempt for the law: for

(1) It encourages tricky and underhand subterfuges to evade a law that is regarded as unjust and unwise. (*Prohibition in America*, quoted in *U.S.B.A. Yearbook*, 1911; pp. 191-198, especially 197;

## THE BRIEF

Hugo Muensterberg, *Text-book of True Temperance*; p. 75.)

- (2) It promotes the growth of law-violating establishments, such as "speak-easies," "blind tigers," etc. (John Kirk, *Encouraging the Moonshiner*; and *U.S.B.A. Year-book*; pp. 217-220.)
- c. It rests upon an unsound moral basis: for
  - (1) It fails to recognize that true morals are the result of self-control, voluntarily effected: for
    - (a) It tries to effect reform through legislative enactment, according to a conception of morals entertained at a given time by a mere majority.
- d. It is purely negative in character: for
  - (1) It fails to recognize that the saloon exists in response to a very definite and real social need. (Committee of Fifty, *Economic Aspects of the Liquor Problem*; pp. 210-240.)
  - (2) It offers no substitute for the saloon.
- e. It is unjust: for

- (1) Whereas the law is designed to punish the seller;
- (1') Yet it does not affect the purchaser.
- (2) Whereas the rich can secure liquor by importation, etc.;
- (2') Yet the poor can secure it only by violation of the law.

B. Local option is bound to fail: for

- 1. Under the most favorable conditions the system can serve only as a temporary makeshift: for

- a. It affects only small districts as units, and for a limited period of time, ranging from one to two years, according to the frequency of elections in those districts. (Joseph Debar, *Prohibition, Its Relation to Good Government*; pp. 15-16.)

C. The system of high license and government regulation will necessarily remain ineffective: for

- 1. Control by the government can be secured only at second hand: for

- a. Government agents are subject to fatally strong temptation to shirk their duty: for

- (1) Profits under private management are sufficiently high to pay well for "police protection," to offer "graft" to those "higher up," and in other ways to secure immunity for violation of the law.

## THE BRIEF

- b. The government is dealing with men whose greatest interest is to use their property for immoral and illegal purposes. (Chicago Vice Commission, *The Social Vice in Chicago*; pp. 119-140.)
- 2. The saloon business is necessarily degraded by the element of private profit:
  - for
    - a. The strong inducement of high profits is often sufficient to turn the saloon into an institution that panders to vicious elements and tastes: for
      - (1) A saloon-keeper's success is measured not by the way in which his business is run, but by the amount of his profits.
    - b. The temptation to increase profits in illegal ways is especially strong: for
      - (1) The saloon is a social center and an attraction to great numbers who have no other place in which to gather. (Committee of Fifty, *Economic Aspects of the Liquor Problem*; pp. 210-240.)
      - (2) The opportunities of gain from the establishment of dance-halls, gambling-rooms, and brothels are ready at hand for the saloon-keeper. (Vice Commission of Chicago, *The Social*

*Evil in Chicago*; pp. 119–140.)

3. Control by the government is too difficult of enforcement: for
  - a. Whereas the investigation made by the New York Vice Commission shows that out of 794 saloons visited from January to November, 1912, 308 were found to be “disorderly”;
  - a'. Yet in the year from September, 1911, to September, 1912, there were but six revocations of licenses for “disorderliness.” (*Commercial Prostitution in New York*; pp. 145 and 161.)

III. The solution offered by the plan proposed presents a fundamentally sound and intelligent basis for dealing with the liquor problem: for

A. Governmental authorities will be able to take care of a definite and real social need without the debauchery of that need by the greed of gain: for

1. The object of running a saloon will, under this plan, be to sell good liquor under healthy conditions and in a respectable atmosphere: for
  - a. The success of the institution under the proposed plan would be measured by the efficiency and ability with which it should satisfy a social need, rather than by the amount of the profit gained.
2. There will be no inducement to promote

the illegal uses now made of the saloon:  
for

*a.* Profit is not the motive underlying the enterprize.

3. Under the proposed plan a more generally organized method of handling the entire saloon question can be scientifically and intelligently evolved in place of the present chaotic method.

4. Other institutions of a social nature, such as dance-halls, etc., now allied with the saloon, could be operated for the benefit of the public under conditions of decency.

B. Direct control of the distribution of liquor will be of great advantage to the community:  
for

1. Such profits as are made can be used for lessening the tax rate, for building roads, schools, and for other community purposes.

2. Under the proposed plan an effective distinction can be made between the grades of liquor sold: for

*a.* Regulations discriminating between the more harmful spirituous liquors and the more beneficial malt and vinous liquors can be put into effect: for

(1) The whole business will be under the control of governmental authorities.

3. Direct governmental control will afford more adequate opportunities than will any other system to effect certain types of social regulation: for example,

- a. Selling to minors.
  - b. Dispensing immoderate quantities of liquor to single individuals.
  - c. Hours of closing.
- C. The solution offered in the plan proposed is eminently practical: for
1. Whereas, at present, in 'all license districts, save those of South Carolina, the municipality, or similar unit, cedes the license to private individuals in return for a definite tax;
  - 1'. Under the proposed plan, the municipality, or other unit (i.e., the government), will retain the title to the license, or licenses, hiring a competent manager, under fixed salary, to conduct the saloon.
  2. The plan proposed has already met with success: for
    - a. It has been adopted by Sisseton, South Dakota, and has been operated effectively for the year that has elapsed since its adoption. (*N. Y. Tribune*, March 24, 1914; p. 1.)
    - b. A variant of the scheme has been successful in South Carolina for some time (i.e., the County Dispensary System).

## Conclusion

- I. SINCE: None of the methods heretofore advocated have proved an adequate solution of the liquor problem; and
- II. SINCE: The methods heretofore used in the attempt

to solve this problem are bound to repeat in the future the failures of the past; and

III. SINCE: The solution offered in the plan of government control will give a fundamentally sound and intelligent basis for dealing with this problem;

THEREFORE: *The elimination of private profit by placing the sale of liquor under government control offers the best solution of the liquor problem.*



## IV

### EXAMPLES OF FAULTY BRIEFING FOR CRITICISM AND CORRECTION

(1)

PROPOSITION: *The growth of the university in the United States will result in the destruction of the small college.*

*(Argument for the negative)*

- I. Every college has a natural supply: for
  - A. The alumni, wishing their Alma Mater to be strong, direct their sons, younger brothers, and friends to their own college.
- II. The prestige of well-known universities will not greatly aid a man in his later life: for
  - A. The business world is becoming too practical to accept a man simply because he has been graduated from one of these large institutions.
- III. The educational value of the university is not so great as that of the college: for
  - A. The contention that there is a greater choice of studies is weak: for
    - 1. The average student can and will follow the same line in the college or in the university; yet
    - 2. We admit that the exceptional student has greater chance to specialize in the university.

- B. The method, wherein lies the difference between the two classes of institutions, rather than the subject, is better in the college: for
1. In the university the lecture method is more generally used on account of the larger numbers of students: whereas
  2. In the college the students receive personal attention and come into personal contact with the professors.
  3. The students in the small college derive the great advantage of recitation and public speaking.

IV. The social life of the college is a great benefit to the students, and is not obtained at the university: for

- A. In the college the student is able to become personally acquainted with his own classmates and many of the other classes: whereas
1. This is impossible in the university.

(2)

PROPOSITION: *Should the course leading to the degree of A.B. be shortened to three years?*

*(Argument for the negative)*

*Introductory*

Of late years there has been a tendency to specialization in almost every subject.

This necessitates giving more time to the preparation of one's specialty after college than was given in the early days.

There is also a tendency to attempt to raise the standard of many colleges by making the requirements for entrance greater:

This necessitates a more thorough college preparation, and consequently that more time be devoted to preparation.

Thus it is that the college course is pressed more and more at both ends.

For this reason many urge that too much time is devoted to the college course, and that it ought to be shortened at least one year.

What we wish to find out is whether such a shortening is necessary, and would be expedient.

### *Argument*

- I. Shortening the college course is not necessary: for
  - A. It is not necessary for those who feel that they must get through college in less than four years: for
    - 1. In very many colleges at the present day provision is made for those who are willing to do four years' work in three.
  - B. An educational career can be shortened in the preparatory school or in the professional school: and hence
    - 1. There are other places than the college in which one's course can be shortened.
  - C. It is better to shorten one's course in either of these two places than in the college: for
    - 1. It is better to shorten the professional course: for
      - a. A professional education only starts in the professional school: for
        - (1) It is a life-long education.
      - b. A liberal education is, at best, but restricted at the present time.
    - 2. It is better to shorten it at the preparatory school: for

## THE BRIEF

- a. According to President Bartlett of Dartmouth College, a year at college has a much better effect on a man's mind than one at preparatory school.
- b. More time is devoted to the courses in the preparatory schools than is necessary: <sup>1</sup> for
  - (1) They teach in many cases subjects that ought to be taught earlier.
  - (2) They teach in many cases subjects that can be better taught in college: for
    - (a) They teach higher mathematics.
    - (b) They teach two years of physics.
    - (c) Such subjects would have better apparatus at college.
    - (d) The teachers in college would be better.
- c. The statement of a prominent educator that it is becoming more and more necessary to shorten a college course because students enter continually at greater age is not true: for
  - (1) While it is true of Harvard, yet statistics show that it is not true of other colleges.
  - (2) The age of entrance at Harvard is becoming more and more uniform.

<sup>1</sup> President Eliot.

(3)

PROPOSITION: *The restoration of the Canteen System would best serve the interests of the United States Army.*

*(An Introduction)*

- I. Two terms in this question need explanation.
  - A. Canteen system means a club for enlisted men where they may meet for a social evening and enjoy a talk over a glass of beer.
  - B. Best interests of the United States Army means, in this question, that the soldiers may have a place for drinking beer in the army grounds.
    1. If liquor is sold in the army, no drunkenness will result; the soldiers will be content.
    2. If liquor is not sold in the army, the men will go outside to low dives and degenerate houses, and will fall morally and physically.
- II. The question, then, resolves itself into this: Is it right to sell liquor in the United States Army?

(4)

PROPOSITION: *The college course leading to the degree B.A. should be limited to three years.*

*(Argument for the negative)*

- I. The plan of shortening the course by dropping the present senior year should not be adopted: for
  - A. The instruction received during the senior year is, however theoretical, indispensable to the well-educated, cultured man: since

1. The instruction of the first three years is mere book-learning; whereas
  2. Senior year teaches ethics and theories of life.
- B. The plan would be unfair to present holders of the degree: as
1. The dropping of senior year would admit men to an equal standing with them, who
    - a. Had not an equal education or knowledge; or
    - b. Had not done an equal amount of work.
- II. The plan of shortening the course by doing four years' work in three should not be adopted: for
- A. Fewer persons would receive the degree: for
1. Only the brightest students could meet the requirement: since
    - a. The curriculum is already crowded (*Har. Mo.* 1899).
    - b. This method would make it even more crowded, and hence,
      - (1) The number of educated citizens would become smaller year by year.
- B. The health of the students could not stand the increased strain: for
1. Climatic conditions in America are not suitable for prolonged study, day after day (*Har. Mo.* 1899).
- C. No time could be given to
1. The cultivation of friendships, not the least valuable part of college life.

2. Debating interests or literary efforts, another valuable part of college life.
  3. Athletics, since
    - a. The students' time would be absorbed by the curriculum.
- III. The plan of dropping freshman year and increasing the admission requirements should not be adopted: for
- A. It would throw the work back into the preparatory schools or into the hands of tutors.
  - B. The student would not receive proper instruction: for
    1. Most preparatory schools have not the funds necessary to secure the most competent instructors.
    2. The colleges have the best teachers in the various departments.
  - C. The same amount of time would be required in the end: for
    1. The proposed method would only force the student to spend the time now occupied in freshman year in another year at the preparatory school in order to meet the higher requirements: hence
      - a. He would secure no gain in time.

(5)

*An argument in favor of the establishment of a merchant marine under the auspices of the Government*

- I. The fact that the shipping interests oppose the pending bill for the establishment of a merchant marine is an argument in favor of the bill: for
  - A. It would be a bad thing for the shipping inter-

ests to have the Government in the field as a rival: for

1. Although the shipping interests fear, to some extent, Government competition;
- 1'. Yet they fear even more that the entrance of the Government-owned ships will be a protection to the independent companies that will enter the field if it is known that fair play and equal competition will be accorded them.

(6)

*An argument from the Lincoln-Douglas Debate at Alton*

I. The contention of the correspondent of the *Chicago Times*, signing himself "An Old Line Whig," that previous to three years ago it had been maintained that the words "all men" in the Declaration of Independence do not include the negro is not to be advanced: for

A. The contention that Henry Clay had denied that this clause includes the negro is untenable: for

1. He upholds this contention by quoting a portion of a speech by Henry Clay which proves exactly the opposite of his contention: for

- a. In this same speech Henry Clay says that it is true, as an abstract principle, that "all men are created equal," but we cannot practically apply it in all cases: for

- (1) In the cases of females, minors, and insane persons it is inapplicable.

- (2) Henry Clay says elsewhere in



the same speech that the declaration that "all men are created equal" is a great fundamental truth.

2. Mr. Clay states a little farther on in this same speech that he looked on the institution of slavery as a great evil.

(7)

*An argument from the Lincoln-Douglas Debate at Alton*

- I. The contention advanced by Mr. Lincoln to the effect that the Union cannot continue to exist half slave and half free is not to be maintained: for
  - A. It is contrary to the principles of those who framed the Constitution to legislate for all the States alike, in disregard of local conditions: for
    1. Whereas a law may be adapted to the Green Mountains of Vermont;
    - 1'. Yet this same law may be unsuited to the rice plantations of South Carolina.
    2. Whereas a law may be well adapted to the prairies of Illinois;
    - 2'. Yet it might not be suited to the mining regions of California.

## V

### SELECTIONS FOR BRIEFING

IN basing a brief upon arguments already set in order by another person, two methods of procedure are to be noted: the brief may be the mere analytical ordering of the arguments as contained in the work under consideration; or the arguments may furnish the material from which one draws an original brief, — selecting, omitting, reinforcing, rearranging the evidence as best suits one's purpose. Of course, the second of these two methods is the natural and more common order of procedure for one whose brief is to serve the normal purpose, — that of convincing another person of the truth of the proposition under discussion. However, for drill and discipline, it is very useful to analyze and set in order a written argument, following the logical processes of the writer, — reconstructing, as it were by conjecture, the brief upon which the elaborated argument was based in the first place.

The following selections constitute material suitable for such "second-hand briefing." The first two — newspaper editorials — have been developed into brief-form as illustrations of the method. In cases of this sort, consisting generally of but a paragraph or two, it would be needless routine to elaborate all the formalities of title, preliminary introduction, main introduction, statement of issues, main argument, and conclusion. In fact, the items in such cases usually present no more than what would, in extended form, constitute the fifth of these subdivisions, the main argument. In the longer selections, however, the student may well develop, as far as the matter will justify, the fully elaborated and formal forensic brief.

## 1. EDITORIALS

## (1)

## RECENT POLICE ACTIVITIES

HOWEVER biased its source, there is point in the contention of the former chief of the New York police, William S. Devery, that the police did wrong to risk the cathedral by letting the dynamiters go so far with their plot. If the bomb had gone off prematurely, the death or arrest of the culprits would have been no consolation for the damage done to the great edifice. In fact, the theatrical way in which the scene was staged does not inspire confidence in the police, and unhappily the very haste made to star the detective concerned as a hero, to the detriment of his future usefulness, gives a certain color to the charge of the conspirators that he was something more than a detective, that he had been playing the part, more familiar in Russia than here, of *agent provocateur*. Such a charge is not easy to prove, and mere assertion is no proof at all, but a widespread suspicion of this sort is harmful, and the tactics of the police ought not to be such as to encourage it. A little less of the dramatic might help to prevent distrust. (*New York Times*.<sup>1</sup>)

- I. The recent action of the New York City police authorities in allowing dynamiters to manufacture, locate, and even light their bombs before their arrest, was unwise: for

A. Ex-Police Captain William S. Devery, a practical police expert, has expressed himself to this effect.

<sup>1</sup> This and the following three editorials are included by the kind permission of the *New York Times*.

- B. Any slight miscarriage in the plans of the detectives engaged on the case might easily have resulted in serious damage and loss of life.
- C. The plan of the department does not inspire public confidence: for
  - 1. Their method of procedure in the case has been distinctly un-American: for
    - a. The detective in charge of the case was practically an *agent provocateur*, as utilized under the Russian Government.
  - 2. Their plan savors suspiciously of the melodramatic: for
    - a. It seems to have been staged for public effect, rather than for securing the ends of justice: for
      - (1) The "starring" of the principal detective in the press has of necessity largely destroyed his further usefulness to the department: for
        - (a) His identity has now become public.

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(2)

#### DELAWARE CLINGS TO THE WHIPPING-POST

In voting by a large majority against the abolition of the whipping-post the House of Representatives in Delaware has shown how conservatism can degenerate into stupidity. Delaware's archaic whipping-post law can justify itself only by pointing to its lineage from the Middle Ages. True, penologists like Magistrate House and Colonel Roosevelt, in their horror of wife-beaters, have urged this brutish pun-

ishment for brutish men. But it defeats its own object. The disgrace of a public flogging reacts upon the beaten wife. She will fear and feel the stigma, and she will shrink from bringing it on her family by complaining. If she enters complaint, the man returns from the lashing angry and incensed, not against the strong-armed jailer, but against the weak woman who was the occasion of his suffering.

But lashes are also bestowed in Delaware on tramps, "confidence" men, thieves, highwaymen, and disorderly persons. A large proportion of men who become tramps is of broken-down drunkards, or the otherwise physically and mentally defective. They need medical treatment, not the cat-o'-nine-tails, and work in the open air on State farms. As for the others, we recall that Warden Meserve, of the New Castle County Workhouse in Delaware, resigned after scourging 235 men, saying that those who were lashed never reformed, but became hardened criminals. It is possible that Delaware is to some extent protected from invasion of the criminally minded from other States by the prevalent fear of the whipping-post. But this advantage, so far as it is obtained, is acquired at the expense of any sane effort at reform of criminals and by a means that brutalizes prisoners, executioners, and — it seems certain — legislators. (*New York Times*.)

- I. The retention of the whipping-post by the House of Representatives in Delaware is an unjudicious measure of legislation: for
  - A. As an effective punishment for the crime of wife-beating public flogging is ineffective: for
    1. Although Magistrate House and Colonel Roosevelt, well-known penologists, have urged its continuance;
    - 1'. Yet the punishment defeats its own end: for

## THE BRIEF

a. The woman in the case is, by the character of the penalty, restrained from bringing complaint against the offender: for

(1) The disgrace of the public flogging brings a stigma upon herself and her family as well as upon the offender himself.

(2) The guilty husband is encouraged to direct further hostility against his wife: for

(a) He naturally feels that she was the immediate cause of his physical suffering.

B. As a punishment for tramps and vagrants the punishment is ineffective: for

1. A large proportion of those who are convicted on these counts are in need of medical treatment rather than of corporal discipline: for

a. They are composed in great degree of men broken down physically or deficient mentally.

2. Those who do not fall under the classification of "deficients" are not reformed by flogging: for

a. Warden Meserve, of the New Castle County Workhouse, who has scourged 235 men, is authority for the statement.

C. The contention that fear of public flogging has protected Delaware from an invasion of criminals from neighboring States is not a sufficient argument for the retention of the penalty: for

1. The protection alleged has been secured only at the expense of sane efforts on the part of the state to substitute modern methods of reforming the criminal for the antiquated and brutal methods of physical punishment.
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(3)

### GOVERNOR VAN WYCK AND THE CANAL RING

Does any man doubt that if Judge Van Wyck is elected Governor he will turn out the thieving Republican canal deepeners and smash their ring? Will he not have the most powerful imaginable motive for putting as many as possible of them in the State prison; the desire, that is, of winning public confidence and approbation in a high degree?

Governor Tilden's pursuit of the Tweed ring thieves made him Governor. His pursuit of the canal ring thieves made him the Democratic candidate for President. Nobody has forgotten that great example of popular trust and admiration centering upon a public officer who had exhibited great zeal and diligence in bringing to justice the rascals who had stolen the people's money. But let no man forget that the rascals Tilden pursued were his political enemies. Tweed had opposed him in the party, and at last, in his coarse and brutal way, had given him a public and moral insult which Tilden could neither forget nor forgive. Tweed was doomed from that day. The biggest canal rascals were Republicans.

Every consideration, personal and political, will urge on Governor Van Wyck to be swift and stern in his dealings with the Republican canal thieves. No consideration of any kind will hold him back.

With Governor Roosevelt, on the contrary, the most

powerful considerations will be those that restrain. Van Wyck will build up his party by dragging this corruption into the light. Roosevelt will destroy his party if he touches it. A Democratic Governor might open the way to the Presidency by a triumphant campaign against the corruptionists. A Republican Governor who attacks George Aldridge and the other powerful Republicans who are responsible for the canal scandal must abandon all higher ambitions. He may smash the canal ring, but he will go out of politics at the end of his term just as Black goes out on January 1.

There is nothing but Roosevelt's native dislike of unworthy public servants that would prompt him to make war on the canal rascals of his party. But how much of that dislike remains? He is making his campaign in strange companionship — Platt, Aldridge, Woodruff. If he can be on such good terms with Republican maladministration in the campaign, what reason have we to expect him after election to turn upon his present intimate associates with sudden austerity?

There is a deadly certainty of doom for the canal rascals if Van Wyck is elected. There is very grave doubt whether Roosevelt's big "if" would n't blind his eyes all through his term. If any voter wants the canal frauds punished he will vote against his intent if he votes for Roosevelt. (*New York Times.*)

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(4)

NOT A MODEL INVESTIGATION

It would, indeed, be a humiliation for the Public Service Commissioners in the First District to be put out of office as the result of the investigation and report of the Thompson Committee. The committee finds as the conclusion of



one of the three reports it has prepared that the Commissioners in the First District "have not put in operation the provisions of the Public Service Commission's law for the regulation of public service corporations in a manner which has produced the results reasonably to be expected." That judgment might be passed upon the work of the Thompson Committee itself. Its labors ended in a disagreement, almost in a fight, and there are two Republican reports and one Democratic. The minority Democrats of the committee have discovered nothing to censure in the doings of the Commissioners, while the two Republican reports find much that is blameworthy, mainly acts of omission, negligence, and inefficiency rather than positive wrong.

The charges which the majority report makes against the Commissioners are not very startling; considered each by itself, they are not very serious. Taken together, they do appear to constitute a case of not enforcing the provisions of the law, particularly in not compelling the public service corporations to obey the orders of the Commission. That raises again the old question whether service corporations would be able to carry on their business if they obeyed all the many orders the regulating commissions issue. Mr. Whitridge, who has come to be considered an authority on these matters, declares in effect that if a corporation in good faith attempted to carry out all the orders issued to it, it would end its days in bankruptcy, and its officers would end theirs in a madhouse. Mr. Whitridge's fondness for the picturesque may have betrayed him into making an extreme statement. But certain it is that commission orders are frequently conflicting, and they sometimes appear to be unreasonable, because to carry them out faithfully would be a public injury, not a public relief. The Commissioners are accused, too, of making altogether too free use of automobiles maintained at the expense of the taxpayers. These charges appear to be proved, and the

guilty Commissioners ought to be thoroughly ashamed of themselves. Men to whom large salaries are paid, and who have a responsibility for the control of a great part of the actual management of corporations employing billions of capital, ought to be above such petty practices.

Altogether, the results of the work done by the investigating committee are unsatisfactory. The Commissioners appear to have laid themselves open to censure; it is possible that they have not given due attention to their duties; they may be incompetent. But three reports from an investigating committee, differing one from the other, and not very positive in their conclusions, are not a very good basis for final action in such a case. Using the material obtained by the committee, Governor Whitman might call upon the Commissioners to answer these and other charges, and by a supplementary investigation of his own he might be able to determine whether it was his duty to remove the Commissioners or to recommend suitable action to the Legislature. The enactment of the Thompson bill without further inquiry would be attributed to a desire to get desirable offices for Republicans. (*New York Times.*)

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(5)

STANDARDS OF EDUCATION IN THE WOMEN'S  
COLLEGES

I suppose no one will question that the leading Eastern colleges for women are, in order of age, approximately, Vassar, Wellesley, Smith, Bryn Mawr, Radcliffe, and Barnard. If ——— will consult the catalogues of these colleges, he will find, I think, that many of his suggestions as to ideal courses have already been anticipated; that the colleges themselves, in fact, are leading the way to a truer standard of education. Many of these courses, however,

indicate changes in curriculum made within a few years. If the sister and the cousins and the friends were graduated even four or five years ago, they had perhaps no opportunity to elect them. But the point remains that the colleges have recognized the worth of special courses in psychology, pedagogy, hygiene, physical chemistry, chemistry of foods, physiology, social science, social ethics, organized charities, daily themes, æsthetics, history of art, and kindred subjects. These courses, moreover, are offered, as our kind critic suggests would be appropriate, "as electives of equal value with literature and mathematics, and not as added burdens to overworked students." I may add that almost all of these electives attract large numbers of students. At least one college offers a course, under the department of philosophy, in the study of child-nature; and the same college has a course devoted to a study of the organized charities of the city in which it is situated. That the head of the department of history in another college has published the most important book of the present day on "Domestic Service," goes to show that such subjects are at least not despised in the colleges for women. I do not present these instances as evidence that all the work done in women's colleges is differentiated to meet the special needs of women, but only as evidence, so far as it goes, that there is a marked tendency in that direction. I question, indeed, whether the colleges are not moving as rapidly in this matter as the public can follow — the limit of any reform, history tells us.

To the second charge, "Imitation of man," we must again, I fear, plead guilty. The university professor who is quoted as saying that "the women will not have any improvement; they wish just the same education as the college men, not a better one," undoubtedly voiced the ideal of the average college girl, at least before she enters college. But, fortunately for her and for her womanhood, she

does not, in most colleges, control either the curriculum or the environment of four of the most impressionable years of life; and thus environment, in spite of the charge brought against it of "Lack of refining influence and tendencies," is often the most culturing influence of her life. In most of the leading colleges for women, art and music are recognized as educational forces, and more or less provision is made for them. In one well-known instance the school of music connected with the college is so managed that its concerts, analysis classes, and rehearsals form a natural part of the college life. The same college has a fine art-gallery, and frequent talks on art are open to the students. Most colleges, too, provide lectures by specialists on music, art, and literature. Much that is beautiful in life comes thus naturally into the life of the college girl. She is, moreover, surrounded by cultured men and women, in spite, again, of the indictment, "Lack of social training." If ——— has time for a tour of the colleges, he can find no better refutation of his theory that they lack refining influences than the students themselves. The difference between the senior and the freshman class of any college is one of the marked features of college life; that in women's colleges this difference is chiefly in the direction of greater womanliness and refinement is perhaps sufficient evidence of the influences at work. Some of the finest women I have known have been members of college faculties. That their very fineness is an indirect argument for celibacy, as suggested, is perhaps true. But why assume, *a priori*, that this is necessarily a misfortune? When I was a freshman in college, I remember, the wife of the president called individually on each member of the freshman class. I should not like to be cited as maintaining that a ten-minutes social call, even from the wife of a college president, would leaven the four years of college life. But the college that can thus take thought for its freshmen is not likely to

neglect entirely the social graces of life. Using the word social in its broader sense, if the colleges for women fail to give their students an interest in the problems of humanity, as asserted, is it not a little singular that one of the most effective philanthropic movements of the day should be known as the College Settlement? — Jennette Barbour Perry: *The Critic*, September 11, 1897.

## 2. THE COOPER INSTITUTE ADDRESS

*Delivered by Abraham Lincoln in New York City, February 27, 1860*

THIS speech was delivered by Mr. Lincoln after the conclusion of the senatorial campaign in Illinois, during which the debate with Senator Douglas took place and in which Mr. Lincoln was defeated. The address, generally considered the most masterly presentation of the anti-slavery position delivered previous to the Civil War, was made in response to a request that Mr. Lincoln speak before the Young Men's Central Republican Union of New York City, and it afforded him his first opportunity of appearing before an Eastern audience. He felt serious misgivings regarding his ability to address such an audience acceptably, and suffered from all the miseries of personal embarrassment. As he proceeded, however, his self-consciousness disappeared, and his hearers followed his simple but effective argument with the interest and absorption that only the master of forensic oratory can command.

With reference to this speech Horace Greeley wrote: "I do not hesitate to pronounce Mr. Lincoln's speech at Cooper Institute in the spring of 1860 the very best political address to which I ever listened, and I have heard some of Webster's grandest. As a literary effort, it would not, of course, bear comparison with many of Webster's speeches; but, regarded as an effort to convince the largest possible number that they ought to be on the speaker's side, not on the other, I do not hesitate to pronounce it unsurpassed."

MR. PRESIDENT AND FELLOW-CITIZENS OF NEW YORK:

The facts with which I shall deal this evening are mainly old and familiar; nor is there anything new in the general use I shall make of them. If there shall be any novelty, it will be in the mode of presenting the facts, and the inferences and observations following that presentation. In his speech last autumn at Columbus, Ohio, as reported in the *New York Times*, Senator Douglas said:—

Our fathers, when they framed the government under which we live, understood this question just as well, and even better, than we do now.

I fully endorse this, and I adopt it as a text for this discourse. I so adopt it because it furnishes a precise and an agreed starting-point for a discussion between Republicans and that wing of the Democracy headed by Senator Douglas. It simply leaves the inquiry: What was the understanding those fathers had of the question mentioned?

What is the frame of government under which we live? The answer must be, "The Constitution of the United States." That Constitution consists of the original, framed in 1787, and under which the present government first went into operation, and twelve subsequently framed amendments, the first ten of which were framed in 1789.

Who were our fathers that framed the Constitution? I suppose the "thirty-nine" who signed the original instrument may be fairly called our fathers who framed that part of the present government. It is almost exactly true to say they framed it, and it is altogether true to say they fairly represented the opinion and sentiment of the whole nation at that time. Their names, being familiar to nearly all, and accessible to quite all, need not now be repeated.

I take these "thirty-nine," for the present, as being "our fathers who framed the government under which we live." What is the question which, according to the text, those fathers understood "just as well, and even better, than we do now"?

It is this: Does the proper division of local from Federal authority, or anything in the Constitution, forbid our Federal Government to control as to slavery in our Federal Territories?

Upon this, Senator Douglas holds the affirmative, and Republicans the negative. This affirmation and denial form an issue; and this issue — this question — is precisely what the text declares our fathers understood "better than we." Let us now inquire whether the "thirty-nine," or any of

them, ever acted upon this question; and if they did, how they acted upon it — how they expressed that better understanding. In 1784, three years before the Constitution, the United States then owning the Northwestern Territory, and no other, the Congress of the Confederation had before them the question of prohibiting slavery in that Territory, and four of the “thirty-nine” who afterward framed the Constitution were in that Congress, and voted on that question. Of these, Roger Sherman, Thomas Mifflin, and Hugh Williamson voted for the prohibition, thus showing that, in their understanding, no line dividing local from Federal authority, nor anything else, properly forbade the Federal Government to control as to slavery in Federal territory. The other of the four, James McHenry, voted against the prohibition, showing that for some cause he thought it improper to vote for it.

In 1787, still before the Constitution, but while the convention was in session framing it, and while the Northwestern Territory still was the only Territory owned by the United States, the same question of prohibiting slavery in the Territory again came before the Congress of the Confederation; and two more of the “thirty-nine” who afterward signed the Constitution were in that Congress, and voted on the question. They were William Blount and William Few; and they both voted for the prohibition — thus showing that in their understanding no line dividing local from Federal authority, nor anything else, properly forbade the Federal Government to control as to slavery in Federal territory. This time the prohibition became a law, being part of what is now well known as the Ordinance of '87.

The question of Federal control of slavery in the Territories seems not to have been directly before the convention which framed the original Constitution; and hence it is not recorded that the “thirty-nine,” or any of them, while



engaged on that instrument, expressed any opinion on that precise question.

In 1789, by the first Congress which sat under the Constitution, an act was passed to enforce the Ordinance of '87, including the prohibition of slavery in the Northwestern Territory. The bill for this act was reported by one of the "thirty-nine" — Thomas Fitzsimmons, then a member of the House of Representatives from Pennsylvania. It went through all its stages without a word of opposition, and finally passed both branches without ayes and nays, which is equivalent to a unanimous passage. In this Congress there were sixteen of the thirty-nine fathers who framed the original Constitution. They were John Langdon, Nicholas Gilman, Wm. S. Johnson, Roger Sherman, Robert Morris, Thomas Fitzsimmons, Abraham Baldwin, William Few, Rufus King, William Patterson, George Clymer, Richard Bassett, George Read, Pierce Butler, Daniel Carroll, and James Madison.

This shows that, in their understanding, no line dividing local from Federal authority, nor anything in the Constitution, properly forbade Congress to prohibit slavery in the Federal territory; else both their fidelity to correct principle, and their oath to support the Constitution, would have constrained them to oppose the prohibition.

Again, George Washington, another of the "thirty-nine," was then President of the United States, and as such approved and signed the bill, thus completing its validity as a law, and thus showing that, in his understanding, no line dividing local from Federal authority, nor anything in the Constitution, forbade the Federal Government to control as to slavery in Federal territory.

No great while after the adoption of the original Constitution, North Carolina ceded to the Federal Government the country now constituting the State of Tennessee; and a few years later Georgia ceded that which now constitutes

the States of Mississippi and Alabama. In both deeds of cession it was made a condition by the ceding States that the Federal Government should not prohibit slavery in the ceded country. Besides this, slavery was then actually in the ceded country. Under these circumstances, Congress, on taking charge of these countries, did not absolutely prohibit slavery within them. But they did interfere with it — take control of it — even there, to a certain extent. In 1798 Congress organized the Territory of Mississippi. In the act of organization they prohibited the bringing of slaves into the Territory from any place without the United States, by fine, and giving freedom to slaves so brought. This act passed both branches of Congress without yeas and nays. In that Congress were three of the “thirty-nine” who framed the original Constitution. They were John Langdon, George Read, and Abraham Baldwin. They all probably voted for it. Certainly they would have placed their opposition to it upon record if, in their understanding, any line dividing local from Federal authority, or anything in the Constitution, properly forbade the Federal Government to control as to slavery in Federal Territory.

In 1803, the Federal Government purchased the Louisiana country. Our former territorial acquisitions came from certain of our own States; but this Louisiana country was acquired from a foreign nation. In 1804, Congress gave a territorial organization to that part of it which now constitutes the State of Louisiana. New Orleans, lying within that part, was an old and comparatively large city. There were other considerable towns and settlements, and slavery was extensively and thoroughly intermingled with the people. Congress did not, in the Territorial Act, prohibit slavery; but they did interfere with it — take control of it — in a more marked and extensive way than they did in the case of Mississippi. The substance of the provision therein made in relation to slaves was:

1st. That no slave should be imported into the Territory from foreign parts.

2d. That no slave should be carried into it who had been imported into the United States since the first day of May, 1798.

3d. That no slave should be carried into it, except by the owner, and for his own use as a settler; the penalty in all cases being a fine upon the violator of the law, and freedom to the slave.

This act also was passed without ayes or nays. In the Congress which passed it there were two of the "thirty-nine." They were Abraham Baldwin and Jonathan Dayton. As stated in the case of Mississippi, it is probable they both voted for it. They would not have allowed it to pass without recording their opposition to it if, in their understanding, it violated either the line properly dividing local from Federal authority, or any provision of the Constitution.

In 1819-20 came and passed the Missouri question. Many votes were taken, by yeas and nays, in both branches of Congress, upon the various phases of the general question. Two of the "thirty-nine" — Rufus King and Charles Pinckney — were members of that Congress. Mr. King steadily voted for slavery prohibition and against all compromises, while Mr. Pinckney as steadily voted against slavery prohibition and against all compromises. By this, ~~Mr.~~ Mr. King showed that, in his understanding, no line dividing local from Federal authority, nor anything in the Constitution, was violated by Congress prohibiting slavery in Federal territory; while Mr. Pinckney, by his votes, showed that, in his understanding, there was some sufficient reason for opposing such prohibition in that case.

The cases I have mentioned are the only acts of the "thirty-nine," or of any of them, upon the direct issue, which I have been able to discover.

To enumerate the persons who thus acted as being four

in 1784, two in 1787, seventeen in 1789, three in 1798, two in 1804, and two in 1819-20, there would be thirty of them. But this would be counting John Langdon, Roger Sherman, William Few, Rufus King, and George Read each twice, and Abraham Baldwin three times. The true number of those of the "thirty-nine" whom I have shown to have acted upon the question which, by the text, they understood better than we, is twenty-three, leaving sixteen not shown to have acted upon it in any way.

Here, then, we have twenty-three out of our thirty-nine fathers "who framed the government under which we live," who have, upon their official responsibility and their corporal oaths, acting upon the very question which the text affirms they "understood just as well, and even better, than we do now"; and twenty-one of them — a clear majority of the whole "thirty-nine" — so acting upon it as to make them guilty of gross political impropriety and wilful perjury if, in their understanding, any proper division between local and Federal authority, or anything in the Constitution they had made themselves, and sworn to support, forbade the Federal Government to control as to slavery in the Federal Territories. Thus the twenty-one acted; and, as actions speak louder than words, so actions under such responsibility speak still louder.

Two of the twenty-three voted against Congressional prohibition of slavery in the Federal Territories, in the instances in which they acted upon the question. But for what reasons they so voted is not known. They may have done so because they thought a proper division of local from Federal authority, or some provision or principle of the Constitution, stood in the way; or they may, without any such question, have voted against the prohibition on what appeared to them to be sufficient grounds of expediency. No one who has sworn to support the Constitution can conscientiously vote for what he understands to be an

unconstitutional measure, however expedient he may think it; but one may and ought to vote against a measure which he deems constitutional if, at the same time, he deems it inexpedient. It, therefore, would be unsafe to set down even the two who voted against the prohibition as having done so because, in their understanding, any proper division of local from Federal authority, or anything in the Constitution, forbade the Federal Government to control as to slavery in Federal territory.

The remaining sixteen of the "thirty-nine," so far as I have discovered, have left no record of their understanding upon the direct question of Federal control of slavery in the Federal Territories. But there is much reason to believe that their understanding upon that question would not have appeared different from that of their twenty-three compeers, had it been manifested at all.

For the purpose of adhering rigidly to the text, I have purposely omitted whatever understanding may have been manifested by any person, however distinguished, other than the thirty-nine fathers who framed the original Constitution; and, for the same reason, I have also omitted whatever understanding may have been manifested by any of the "thirty-nine" even on any other phase of the general question of slavery. If we should look into their acts and declarations on those other phases, as the foreign slave-trade, and the morality and policy of slavery generally, it would appear to us that on the direct question of Federal control of slavery in Federal Territories, the sixteen, if they had acted at all, would probably have acted just as the twenty-three did. Among that sixteen were several of the most noted anti-slavery men of those times — Dr. Franklin, Alexander Hamilton, and Gouverneur Morris — while there was not one now known to have been otherwise, unless it may be John Rutledge, of South Carolina.

The sum of the whole is that of our thirty-nine fathers

who framed the original Constitution, twenty-one — a clear majority of the whole — certainly understood that no proper division of local from Federal authority, nor any part of the Constitution, forbade the Federal Government to control slavery in the Federal Territories; while all the rest had probably the same understanding. Such, unquestionably, was the understanding of our fathers who framed the original Constitution; and the text affirms that they understood the question “better than we.”

But, so far, I have been considering the understanding of the question manifested by the framers of the original Constitution. In and by the original instrument, a mode was provided for amending it; and, as I have already stated, the present frame of “the government under which we live” consists of that original, and twelve amendatory articles framed and adopted since. Those who now insist that Federal control of slavery in Federal Territories violates the Constitution, point us to the provisions which they suppose it thus violates; and, as I understand, they all fix upon provisions in these amendatory articles, and not in the original instrument. The Supreme Court, in the Dred Scott case, plant themselves upon the fifth amendment, which provides that no person shall be deprived of “life, liberty, or property without due process of law”; while Senator Douglas and his peculiar adherents plant themselves upon the tenth amendment, providing that “the powers not delegated to the United States by the Constitution” “are reserved to the States respectively, or to the people.”

✕ Now it so happens that these amendments were framed by the first Congress which sat under the Constitution — the identical Congress which passed the act, already mentioned, enforcing the prohibition of slavery in the Northwestern Territory. Not only was it the same Congress, but they were the identical, same individual men who, at the same session, and at the same time within the session, had

under consideration, and in progress toward maturity, these constitutional amendments, and this act prohibiting slavery in all the territory the nation then owned. The constitutional amendments were introduced before, and passed after the act enforcing the Ordinance of '87; so that, during the whole pendency of the act to enforce the Ordinance, the constitutional amendments were also pending.

The seventy-six members of that Congress, including sixteen of the framers of the original Constitution, as before stated, were pre-eminently our fathers who framed that part of "the government under which we live," which is now claimed as forbidding the Federal Government to control slavery in the Federal Territories.

Is it not a little presumptuous in anyone at this day to affirm that the two things which that Congress deliberately framed, and carried to maturity at the same time, are absolutely inconsistent with each other? And does not such affirmation become impudently absurd when coupled with the other affirmation, from the same mouth, that those who did the two things alleged to be inconsistent, understood whether they really were inconsistent better than we — better than he who affirms that they are inconsistent?

It is surely safe to assume that the thirty-nine framers of the original Constitution, and the seventy-six members of the Congress which framed the amendments thereto, taken together, do certainly include those who may be fairly called "our fathers who framed the government under which we live." And so assuming, I defy any man to show that any one of them ever, in his whole life, declared that, in his understanding, any proper division of local from Federal authority, or any part of the Constitution, forbade the Federal Government to control as to slavery in the Federal Territories. I go a step further. I defy anyone to show that any living man in the world ever did, prior to the beginning of the present century (and I might almost say prior to the

beginning of the last half of the present century), declare that, in his understanding, any proper division of local from Federal authority, or any part of the Constitution, forbade the Federal Government to control as to slavery in the Federal Territories. To those who now so declare I give not only "our fathers who framed the government under which we live," but with them all other living men within the century in which it was framed, among whom to search, and they shall not be able to find the evidence of a single man agreeing with them.

Now, and here, let me guard a little against being misunderstood. I do not mean to say we are bound to follow implicitly in whatever our fathers did. To do so would be to discard all the lights of current experience — to reject all progress, all improvement. What I do say is that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive, and argument so clear, that even their great authority, fairly considered and weighed, cannot stand; and most surely not in a case whereof we ourselves declare they understood the question better than we.

If any man at this day sincerely believes that a proper division of local from Federal authority, or any part of the Constitution, forbids the Federal Government to control as to slavery in the Federal Territories, he is right to say so, and to enforce his position by all truthful evidence and fair argument which he can. But he has no right to mislead others, who have less access to history, and less leisure to study it, into the false belief that "our fathers who framed the government under which we live" were of the same opinion — thus substituting falsehood and deception for truthful evidence and fair argument. If any man at this day sincerely believes "our fathers who framed the government under which we live" used and applied principles, in other cases, which ought to have led them to understand



that a proper division of local from Federal authority, or some part of the Constitution, forbids the Federal Government to control as to slavery in the Federal Territories, he is right to say so. But he should, at the same time, brave the responsibility of declaring that, in his opinion, he understands their principles better than they did themselves; and especially should he not shirk that responsibility by asserting that they "understood the question just as well, and even better, than we do now."

But enough! Let all who believe that "our fathers who framed the government under which we live understood this question just as well, and even better, than we do now," speak as they spoke, and act as they acted upon it. This is all Republicans ask — all Republicans desire — in relation to slavery. As those fathers marked it, so let it be again marked, as an evil not to be extended, but to be tolerated and protected only because of and so far as its actual presence amongst us makes that toleration and protection a necessity. Let all the guaranties those fathers gave it be not grudgingly, but fully and fairly maintained. For this Republicans contend, and with this, so far as I know or believe, they will be content.

And now, if they would listen — as I suppose they will not — I would address a few words to the Southern people.

I would say to them: You consider yourselves a reasonable and a just people; and I consider that in the general qualities of reason and justice you are not inferior to any other people. Still, when you speak of us Republicans, you do so only to denounce us as reptiles, or, at the best, as no better than outlaws. You will grant a hearing to pirates or murderers, but nothing like it to "Black Republicans." In all your contentions with one another, each of you deems an unconditional condemnation of "Black Republicanism," as the first thing to be attended to. Indeed, such condemnation of us seems to be an indispensable prerequisite

— license, so to speak — among you to be admitted or permitted to speak at all. Now can you or not be prevailed upon to pause and to consider whether this is quite just to us, or even to yourselves? Bring forward your charges and specifications, and then be patient long enough to hear us deny or justify.

You say we are sectional. We deny it. That makes an issue; and the burden of proof is upon you. You produce your proof; and what is it? Why, that our party has no existence in your section — gets no votes in your section. The fact is substantially true; but does it prove the issue? If it does, then in case we should, without change of principle, begin to get votes in your section, we should thereby cease to be sectional. You cannot escape this conclusion; and yet, are you willing to abide by it? If you are, you will probably soon find that we have ceased to be sectional, for we shall get votes in your section this very year. (You will then begin to discover, as the truth plainly is, that your proof does not touch the issue.) The fact that we get no votes in your section is a fact of your making, and not of ours. And if there be fault in that fact, that fault is primarily yours, and remains so until you show that we repel you by some wrong principle or practice. If we do repel you by any wrong principle or practice, the fault is ours; but this brings you to where you ought to have started — to a discussion of the right or wrong of our principle. If our principle, put in practice, would wrong your section for the benefit of ours, or for any other object, then our principle, and we with it, are sectional, and are justly opposed and denounced as such. Meet us, then, on the question of whether our principle, put in practice, would wrong your section; and so meet us as if it were possible that something may be said on your side. Do you accept the challenge? No! Then you really believe that the principle which “our fathers who framed the government under which we live”

thought so clearly right as to adopt it, and indorse it again and again, upon their official oaths, is in fact so clearly wrong as to demand your condemnation without a moment's consideration.

Some of you delight to flaunt in our faces the warning against sectional parties given by Washington in his Farewell Address. Less than eight years before Washington gave that warning, he had, as President of the United States, approved and signed an act of Congress enforcing the prohibition of slavery in the Northwestern Territory, which act embodied the policy of the government upon that subject up to and at the very moment he penned that warning; and about one year after he penned it, he wrote Lafayette that he considered that prohibition a wise measure, expressing in the same connection his hope that we should at some time have a confederacy of free States.

Bearing this in mind, and seeing that sectionalism has since arisen upon this same subject, is that warning a weapon in your hands against us, or in our hands against you? Could Washington himself speak, would he cast the blame of that sectionalism upon us, who sustain his policy, or upon you, who repudiate it? We respect that warning of Washington, and we commend it to you, together with his example pointing to the right application of it.

But you say you are conservative — eminently conservative — while we are revolutionary, destructive, or something of the sort. What is conservatism? Is it not adherence to the old and tried, against the new and untried? We stick to, contend for, the identical old policy on the point in controversy which was adopted by "our fathers who framed the government under which we live"; while you with one accord reject, and scout, and spit upon that old policy, and insist upon substituting something new. True, you disagree among yourselves as to what that substitute shall be. You are divided on new propositions and plans,

but you are unanimous in rejecting and denouncing the old policy of the fathers. Some of you are for reviving the foreign slave-trade; some for a Congressional slave code for the Territories; some for Congress forbidding the Territories to prohibit slavery within their limits; some for maintaining slavery in the Territories through the judiciary; some for the "gur-reat pur-rinciple" that "if one man would enslave another, no third man should object," fantastically called "popular sovereignty," but never a man among you is in favor of Federal prohibition of slavery in Federal Territories, according to the practice of "our fathers who framed the government under which we live." Not one of all your various plans can show a precedent or an advocate in the century within which our government originated. Consider, then, whether your claim of conservatism for yourselves, and your charge of destructiveness against us, are based on the most clear and stable foundations.

And again, you say we have made the slavery question more prominent than it formerly was. We deny it. We admit that it is more prominent, but we deny that we made it so. It was not we, but you, who discarded the old policy of the fathers. We resisted, and still resist, your innovation; and thence comes the greater prominence of the question. Would you have that question reduced to its former proportions? Go back to that old policy. What has been will be again, under the same conditions. If you would have the peace of the old times, re-adopt the precepts and policy of the old times.

You charge that we stir up insurrections among your slaves. We deny it; and what is your proof? Harper's Ferry! John Brown!! John Brown was no Republican; and you have failed to implicate a single Republican in his Harper's Ferry enterprise. If any member of our party is guilty in that matter, you know it or you do not know it. If you do know it, you are inexcusable for not designating

the man and proving the fact. If you do not know it, you are inexcusable for asserting it, and especially for persisting in the assertion after you have tried and failed to make the proof. You need not be told that persisting in a charge which one does not know to be true is simply malicious slander.

Some of you admit that no Republican designedly aided or encouraged the Harper's Ferry affair, but still insist that our doctrines and declarations necessarily lead to such results. We do not believe it. We know we hold no doctrine, and make no declaration which were not held to and made by "our fathers who framed the government under which we live." You never dealt fairly by us in relation to this affair. When it occurred, some important State elections were near at hand, and you were in evident glee with the belief that, by charging the blame upon us, you could get an advantage of us in those elections. The elections came, and your expectations were not quite fulfilled. Every Republican man knew that, as to himself at least, your charge was a slander, and he was not much inclined by it to cast his vote in your favor. Republican doctrines and declarations are accompanied with a continual protest against any interference whatever with your slaves, or with you about your slaves. Surely, this does not encourage them to revolt. True, we do, in common with "our fathers who framed the government under which we live," declare our belief that slavery is wrong; but the slaves do not hear us declare even this. For anything we say or do, the slaves would scarcely know there is a Republican party. I believe they would not, in fact, generally know it but for your misrepresentations of us in their hearing. In your political contests among yourselves each faction charges the other with sympathy with Black Republicanism; and then, to give point to the charge, defines Black Republicanism to simply be insurrection, blood, and thunder among the slaves.

Slave insurrections are no more common now than they were before the Republican party was organized. What induced the Southampton insurrection,<sup>1</sup> twenty-eight years ago, in which at least three times as many lives were lost as at Harper's Ferry? You can scarcely stretch your very elastic fancy to the conclusion that Southampton was "got up by Black Republicanism." In the present state of things in the United States, I do not think a general, or even a very extensive, slave insurrection is possible. The indispensable concert of action cannot be attained. The slaves have no means of rapid communication; nor can incendiary freeman, black or white, supply it. The explosive materials are everywhere in parcels; but there neither are, nor can be supplied, the indispensable connecting trains.

Much is said by Southern people about the affection of slaves for their masters and mistresses; and a part of it, at least, is true. A plot for an uprising could scarcely be devised and communicated to twenty individuals before some one of them, to save the life of a favorite master or mistress, would divulge it. This is the rule; and the slave revolution in Hayti<sup>2</sup> was not an exception to it, but a case occurring under peculiar circumstances. The Gunpowder Plot of British history, though not connected with slaves, was more in point. In that case, only about twenty were admitted to the secret; and yet one of them, in his anxiety to save a friend, betrayed the plot to that friend, and, by consequence, averted the calamity. Occasional poisonings from the kitchen, and open or stealthy assassinations in the field, and local revolts extending to a score or so, will continue to

<sup>1</sup> An uprising of slaves occurred at Southampton, Virginia, in 1831, and a number of white persons lost their lives.

<sup>2</sup> Bloody and revolutionary slave insurrections took place in Hayti from 1790 to 1793. The negroes under the leadership of the famous Toussaint l'Ouverture ultimately secured the supremacy, and the island declared its independence as a republic in 1801.

occur as the natural results of slavery; but no general insurrection of slaves, as I think, can happen in this country for a long time. Whoever much fears, or much hopes for, such an event will be alike disappointed.

In the language of Mr. Jefferson, uttered many years ago, "It is still in our power to direct the process of emancipation and deportation peaceably, and in such slow degrees as that the evil will wear off insensibly; and their places be, *pari passu*, filled up by free white laborers. If, on the contrary, it is left to force itself on, human nature must shudder at the prospect held up."

Mr. Jefferson did not mean to say, nor do I, that the power of emancipation is in the Federal Government. He spoke of Virginia; and, as to the power of emancipation, I speak of the slaveholding States only. The Federal Government, however, as we insist, has the power of restraining the extension of the institution — the power to insure that a slave insurrection shall never occur on any American soil which is now free from slavery.

John Brown's effort was peculiar. It was not a slave insurrection. It was an attempt by white men to get up a revolt among slaves, in which the slaves refused to participate. In fact, it was so absurd that the slaves, with all their ignorance, saw plainly enough it could not succeed. That affair, in its philosophy, corresponds with the many attempts, related in history, at the assassination of kings and emperors. An enthusiast broods over the oppression of a people till he fancies himself commissioned by Heaven to liberate them. He ventures the attempt, which ends in little else than his own execution. Orsini's attempt on Louis Napoleon, and John Brown's attempt at Harper's Ferry, were, in their philosophy, precisely the same. The eagerness to cast blame on old England in the one case, and on New England in the other, does not disprove the sameness of the two things.

And how much would it avail you, if you could, by the use of John Brown, Helper's book,<sup>1</sup> and the like, break up the Republican organization? Human action can be modified to some extent, but human nature cannot be changed. There is a judgment and a feeling against slavery in this nation, which cast at least a million and a half of votes. You cannot destroy that judgment and feeling — that sentiment — by breaking up the political organization which rallies around it. You can scarcely scatter and disperse an army which has been formed into order in the face of your heaviest fire; but if you could, how much would you gain by forcing the sentiment which created it out of the peaceful channel of the ballot-box into some other channel? What would that other channel probably be? Would the number of John Browns be lessened or enlarged by the operation?

But you will break up the Union rather than submit to a denial of your constitutional rights.

That has a somewhat reckless sound; but it would be palliated, if not fully justified, were we proposing, by the mere force of numbers, to deprive you of some right plainly written down in the Constitution. But we are proposing no such thing.

When you make these declarations, you have a specific and well-understood allusion to an assumed constitutional right of yours to take slaves into the Federal Territories, and to hold them there as property. But no such right is specially written in the Constitution. That instrument is literally silent about any such right. We, on the contrary, deny that such a right has any existence in the Constitution, even by implication.

Your purpose, then, plainly stated, is that you will destroy the government, unless you be allowed to construe

<sup>1</sup> *The Impending Crisis*, by Hinton R. Helper, published in 1857, was a bitter attack upon the moral and economic aspects of slavery.



and force the Constitution as you please, on all points in dispute between you and us. You will rule or ruin in all events.

This, plainly stated, is your language. Perhaps you will say the Supreme Court has decided the disputed constitutional question in your favor. Not quite so. But, waiving the lawyer's distinction between dictum and decision, the court has decided the question for you in a sort of way. The court has substantially said, it is your constitutional right to take slaves into the Federal Territories, and to hold them there as property. When I say the decision was made in a sort of way, I mean it was made in a divided court, by a bare majority of the judges, and they not quite agreeing with one another in the reasons for making it; that it is so made as that its avowed supporters disagree with one another about its meaning, and that it was mainly based upon a mistaken statement of fact — the statement in the opinion that “the right of property in a slave is distinctly and expressly affirmed in the Constitution.”

An inspection of the Constitution will show that the right of property in a slave is not “distinctly and expressly affirmed” in it. Bear in mind, the judges do not pledge their judicial opinion that such right is impliedly affirmed in the Constitution; but they pledge their veracity that it is “distinctly and expressly” affirmed there — “distinctly,” that is, not mingled with anything else — “expressly,” that is, in words meaning just that, without the aid of any inference, and susceptible of no other meaning.

If they had only pledged their judicial opinion that such right is affirmed in the instrument by implication, it would be open to others to show that neither the word “slave” nor “slavery” is to be found in the Constitution, nor the word “property” even, in any connection with language alluding to the thing slave or slavery; and that wherever in that instrument the slave is alluded to, he is called a

“person”; and wherever his master’s legal right in relation to him is alluded to, it is spoken of as “service or labor which may be due” — as a debt payable in service or labor. Also it would be open to show, by contemporaneous history, that this mode of alluding to slaves and slavery, instead of speaking of them, was employed on purpose to exclude from the Constitution the idea that there could be property in man.

To show all this is easy and certain.

When this obvious mistake of the judges shall be brought to their notice, is it not reasonable to expect that they will withdraw the mistaken statement, and reconsider the conclusion based upon it?

And then it is to be remembered that “our fathers who framed the government under which we live” — the men who made the Constitution — decided this same constitutional question in our favor long ago; decided it without division among themselves when making the decision; without division among themselves about the meaning of it after it was made, and, so far as any evidence is left, without basing it upon any mistaken statement of facts.

Under all these circumstances, do you really feel yourselves justified to break up this government unless such a court decision as yours is shall be at once submitted to as a conclusive and final rule of political action? But you will not abide the election of a Republican president! In that supposed event, you say, you will destroy the Union; and then, you say, the great crime of having destroyed it will be upon us! That is cool. A highwayman holds a pistol to my ear, and mutters through his teeth, “Stand and deliver, or I shall kill you, and then you will be a murderer!”

To be sure, what the robber demanded of me — my money — was my own; and I had a clear right to keep it; but it was no more my own than my vote is my own; and the threat of death to me, to extort my money, and the

threat of destruction to the Union, to extort my vote, can scarcely be distinguished in principle.

A few words now to Republicans. It is exceedingly desirable that all parts of this great Confederacy shall be at peace, and in harmony one with another. Let us Republicans do our part to have it so. Even though much provoked, let us do nothing through passion and ill temper. Even though the Southern people will not so much as listen to us, let us calmly consider their demands, and yield to them if, in our deliberate view of our duty, we possibly can. Judging by all they say and do, and by the subject and nature of their controversy with us, let us determine, if we can, what will satisfy them.

Will they be satisfied if the Territories be unconditionally surrendered to them? We know they will not. In all their present complaints against us, the Territories are scarcely mentioned. Invasions and insurrections are the rage now. Will it satisfy them if, in the future, we have nothing to do with invasions and insurrections? We know it will not. We so know, because we know we never had anything to do with invasions and insurrections; and yet this total abstaining does not exempt us from the charge and the denunciation.

The question recurs, What will satisfy them? Simply this: we must not only let them alone, but we must somehow convince them that we do let them alone. This, we know by experience, is no easy task. We have been so trying to convince them from the very beginning of our organization, but with no success. In all our platforms and speeches we have constantly protested our purpose to let them alone; but this has had no tendency to convince them. Alike unavailing to convince them is the fact that they have never detected a man of us in any attempt to disturb them.

These natural and apparently adequate means all failing,

what will convince them? This, and this only: cease to call slavery wrong, and join them in calling it right. And this must be done thoroughly — done in acts as well as in words. Silence will not be tolerated — we must place ourselves avowedly with them. Senator Douglas's new sedition law must be enacted and enforced, suppressing all declarations that slavery is wrong, whether made in politics, in presses, in pulpits, or in private. We must arrest and return their fugitive slaves with greedy pleasure. We must pull down our free State constitutions. The whole atmosphere must be disinfected from all taint of opposition to slavery, before they will cease to believe that all their troubles proceed from us.

I am quite aware they do not state their case precisely in this way. Most of them would probably say to us, "Let us alone; do nothing to us, and say what you please about slavery." But we do let them alone — have never disturbed them — so that, after all, it is what we say which dissatisfies them. They will continue to accuse us of doing, until we cease saying.

I am also aware they have not as yet in terms demanded the overthrow of our free-State constitutions. Yet those constitutions declare the wrong of slavery with more solemn emphasis than do all other sayings against it; and when all these other sayings shall have been silenced, the overthrow of these constitutions will be demanded, and nothing be left to resist the demand. It is nothing to the contrary that they do not demand the whole of this just now. Demanding what they do, and for the reason they do, they can voluntarily stop nowhere short of this consummation. Holding, as they do, that slavery is morally right and socially elevating, they cannot cease to demand a full national recognition of it as a legal right and a social blessing.

Nor can we justifiably withhold this on any ground save

our conviction that slavery is wrong. If slavery is right, all words, acts, laws, and constitutions against it are themselves wrong, and should be silenced and swept away. If it is right, we cannot justly object to its nationality — its universality; if it is wrong, they cannot justly insist upon its extension — its enlargement. All they ask we could readily grant, if we thought slavery right; all we ask they could as readily grant, if they thought it wrong. Their thinking it right and our thinking it wrong is the precise fact upon which depends the whole controversy. Thinking it right, as they do, they are not to blame for desiring its full recognition as being right; but thinking it wrong, as we do, can we yield to them? Can we cast our votes with their view, and against our own? In view of our moral, social, and political responsibilities, can we do this?

Wrong as we think slavery is, we can yet afford to let it alone where it is, because that much is due to the necessity arising from its actual presence in the nation; but can we, while our votes will prevent it, allow it to spread into the national Territories, and to overrun us here in these free States? If our sense of duty forbids this, then let us stand by our duty fearlessly and effectively. Let us be diverted by none of those sophistical contrivances wherewith we are so industriously plied and belabored — contrivances such as groping for some middle ground between the right and the wrong: vain as the search for a man who should be neither a living man nor a dead man; such as a policy of “don’t care” on a question about which all true men do care; such as Union appeals beseeching true Union men to yield to Disunionists, reversing the divine rule, and calling, not the sinners, but the righteous to repentance; such as invocations to Washington, imploring men to unsay what Washington said and undo what Washington did.

Neither let us be slandered from our duty by false accusations against us, nor frightened from it by menaces of

destruction to the government, nor of dungeons to ourselves. Let us have faith that right makes might, and in that faith let us to the end dare to do our duty as we understand it.

### 3. THE SPEECH OF THE HONORABLE ELIHU ROOT OF NEW YORK

*In the Senate of the United States, on the Panama Canal Tolls,  
January 21, 1913*<sup>1</sup>

ON August 24, 1912, the House of Representatives approved an act "for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone." Section 5 of this bill provided: "That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: Provided, That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. *No tolls shall be levied upon vessels engaged in the coastwise trade of the United States. . . .* When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, *other than for vessels of the United States and its citizens*, than the estimated proportionate cost of the actual maintenance and operation of the Canal, subject, however, to the provisions of article 19 of the convention between the United States and the Republic of Panama."

On January 14, 1913, Mr. Root, of New York, introduced in the Senate an amendment striking out from section 5 the words italicized above: "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States," and also, "other than for vessels of the United States and its citizens." Mr. Root's amendment was read twice and referred to the Committee on Interoceanic Canals, where it died.

There was, however, a very considerable and non-partisan sentiment throughout the country, supported by an influential portion of the press and by small groups in both houses of Congress, to the effect that the principle underlying Mr. Root's amendment was right in principle, in that by section 5 the Panama Canal Act violated the Hay-Pauncefote Treaty with Great Britain. Furthermore, President Wilson shared strongly in this

<sup>1</sup> From the *Congressional Record*, by the kind permission of Mr. Root.

opinion, and in February, 1914, read a message in Congress asking for a reversal of the objectionable legislation.

11 In March the House Committee reported favorably a bill repealing the exemption clause of the Panama Canal Act. Debate on the measure continued from March 6 to March 31, when the bill passed the House by a vote of 247 to 162. When the measure was brought before the Senate a long struggle ensued, but finally on June 11, it was passed in the following amended form:

Provided, That the passage of this act shall not be construed or held as a waiver or relinquishment of any right the United States may have under the treaty with Great Britain, ratified February 21, 1902, or the treaty with the Republic of Panama, ratified February 26, 1904, or otherwise, to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through said Canal, or as in any way waiving, impairing, or affecting any right of the United States under said treaties, or otherwise, with respect to the sovereignty over or the ownership, control, and management of said Canal, and the regulation of the conditions or charges of traffic through the same.

On the following day, June 12, the House concurred in the Senate amendment, and on June 15 it received the President's signature.

MR. PRESIDENT, in the late days of last summer, after nearly nine months of continuous session, Congress enacted, in the bill to provide for the administration of the Panama Canal, a provision making a discrimination between the tolls to be charged upon foreign vessels and the tolls to be charged upon American vessels engaged in coastwise trade. We all must realize, as we look back, that when that provision was adopted the members of both houses were much exhausted; our minds were not working with their full vigor; we were weary physically and mentally. Such discussion as there was, was to empty seats. In neither House of Congress, during the period that this provision was under discussion, could there be found more than a scant dozen or two of members. The provision has been the cause of great regret to a multitude of our fellow citizens, whose good



opinion we all desire and whose leadership of opinion in the country makes their approval of the course of our Congress an important element in maintaining that confidence in government which is so essential to its success. The provision has caused a painful impression throughout the world that the United States has departed from its often-announced rule of equality of opportunity in the use of the Panama Canal, and is seeking a special advantage for itself in what is believed to be a violation of the obligations of a treaty. Mr. President, that opinion of the civilized world is something which we may not lightly disregard. "A decent respect to the opinions of mankind" was one of the motives stated for the people of these colonies in the great Declaration of American Independence.

The effect of the provision has thus been doubly unfortunate, and I ask the Senate to listen to me while I endeavor to state the situation in which we find ourselves; to state the case which is made against the action that we have taken, in order that I may present to the Senate the question whether we should not either submit to an impartial tribunal the question whether we are right, so that, if we are right, we may be vindicated in the eyes of all the world; or whether we should not, by a repeal of the provision, retire from the position which we have taken.

In the year 1850, Mr. President, there were two great powers in possession of the North American Continent to the north of the Rio Grande. The United States had but just come to its full stature. By the Webster-Ashburton Treaty of 1842 our northeastern boundary had been settled, leaving to Great Britain that tremendous stretch of seacoast including Nova Scotia, New Brunswick, Newfoundland, Labrador, and the shores of the Gulf of St. Lawrence, now forming the Province of Quebec. In 1846 the Oregon boundary had been settled, assuring to the

United States a title to that vast region which now constitutes the States of Washington, Oregon, and Idaho. In 1848 the Treaty of Guadalupe-Hidalgo had given to us that great empire wrested from Mexico as a result of the Mexican War, which now spreads along the coast of the Pacific as the State of California and the great region between California and Texas.

Inspired by the manifest requirements of this new empire, the United States turned its attention to the possibility of realizing the dream of centuries and connecting its two coasts — its old coast upon the Atlantic and its new coast upon the Pacific — by a ship canal through the Isthmus; but when it turned its attention in that direction, it found the other empire holding the place of advantage. Great Britain had also her coast upon the Atlantic and her coast upon the Pacific, to be joined by a canal. Further than that, Great Britain was a Caribbean power. She had Bermuda and the Bahamas; she had Jamaica and Trinidad; she had the Windward Islands and the Leeward Islands; she had British Guiana and British Honduras; she had, moreover, a protectorate over the Mosquito Coast, a great stretch of territory upon the eastern shore of Central America which included the river San Juan and the valley and harbor of San Juan de Nicaragua, or Greytown. All men's minds then were concentrated upon the Nicaragua Canal route, as they were until after the Treaty of 1901 was made.

And thus, when the United States turned its attention toward joining these two coasts by a canal through the Isthmus, it found Great Britain in possession of the eastern end of the route which men generally believed would be the most available route for the canal. Accordingly, the United States sought a treaty with Great Britain by which Great Britain should renounce the advantage which she had and admit the United States to equal participation with her in

the control and the protection of a canal across the Isthmus. From that came the Clayton-Bulwer Treaty.

Let me repeat that this treaty was sought, not by England, but by the United States. Mr. Clayton, who was Secretary of State at the time, sent our Minister to France, Mr. Rives, to London for the purpose of urging upon Lord Palmerston the making of the treaty. The treaty was made by Great Britain as a concession to the urgent demands of the United States.

I should have said, in speaking about the urgency with which the United States sought the Clayton-Bulwer Treaty, that there were two treaties made with Nicaragua, one by Mr. Heis and one by Mr. Squire, both representatives of the United States. Each gave, so far as Nicaragua could, great powers to the United States in regard to the construction of a canal, but they were made without authorization from the United States, and they were not approved by the Government of the United States and were never sent to the Senate. Mr. Clayton, however, held those treaties in abeyance as a means of inducing Great Britain to enter into the Clayton-Bulwer Treaty. He held them practically as a whip over the British negotiators, and, having accomplished the purpose, they were thrown into the waste-basket.

By that treaty Great Britain agreed with the United States that neither Government would "ever obtain or maintain for itself any exclusive control over the ship canal"; that neither would "make use of any protection" which either afforded to a canal "or any alliance which either" might have "with any State or people for the purpose of erecting or maintaining any fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same"; and that neither would "take advantage of any intimacy, or use any

alliance, connection, or influence that either" might "possess with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other."

You will observe, Mr. President, that under these provisions the United States gave up nothing that it then had. Its obligations were entirely looking to the future; and Great Britain gave up its rights under the protectorate over the Mosquito Coast, gave up its rights to what was supposed to be the eastern terminus of the canal. And, let me say without recurring to it again, under this treaty, after much discussion which ensued as to the meaning of its terms, Great Britain did surrender her rights to the Mosquito Coast, so that the position of the United States and Great Britain became a position of absolute equality. Under this treaty also both parties agreed that each would "enter into treaty stipulations with such of the Central American States as they" might "deem advisable for the purpose" — I now quote the words of the treaty — "for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind, on equal terms to all, and of protecting the same."

That declaration, Mr. President, is the corner-stone of the rights of the United States upon the Isthmus of Panama, rights having their origin in a solemn declaration that there should be constructed and maintained a ship canal "between the two oceans for the benefit of mankind, on equal terms to all."

In the eighth article of that treaty the parties agreed:

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

There, Mr. President, is the explicit agreement for equality of treatment to the citizens of the United States and to the citizens of Great Britain in any canal, wherever it may be constructed, across the Isthmus. That was the fundamental principle embodied in the Treaty of 1850. And we are not without an authoritative construction as to the scope and requirements of an agreement of that description, because we have another treaty with Great Britain — a treaty which formed one of the great landmarks in the diplomatic history of the world, and one of the great steps in the progress of civilization — the Treaty of Washington of 1871, under which the Alabama claims were submitted to arbitration. Under that treaty there were provisions for the use of the American canals along the waterway of the Great Lakes, and the Canadian canals along the same line of communication, upon equal terms to the citizens of the two countries.

Some years after the treaty, Canada undertook to do something quite similar to what we have undertaken to do in this law about the Panama Canal. It provided that while nominally a toll of twenty cents a ton should be charged upon the merchandise both of Canada and of the United States there should be a rebate of eighteen cents for all merchandise which went to Montreal or beyond, leaving a toll of but two cents a ton for that merchandise. The United States objected; and I beg your indulgence while I read from the message of President Cleveland upon that subject, sent to the Congress August 23, 1888. He says:

By article 27 of the Treaty of 1871 provision was made to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion of Canada on terms of equality with the inhabitants of the Dominion, and to also secure to the subjects of Great Britain the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States.

The equality with the inhabitants of the Dominion which we were promised in the use of the canals of Canada did not secure to us freedom from tolls in their navigation, but we had a right to expect that we, being Americans and interested in American commerce, would be no more burdened in regard to the same than Canadians engaged in their own trade; and the whole spirit of the concession made was, or should have been, that merchandise and property transported to an American market through these canals should not be enhanced in its cost by tolls many times higher than such as were carried to an adjoining Canadian market. All our citizens, producers and consumers, as well as vessel owners, were to enjoy the equality promised.

And yet evidence has for some time been before the Congress, furnished by the Secretary of the Treasury, showing that, while the tolls charged in the first instance are the same to all, such vessels and cargoes as are destined to certain Canadian ports —

their coastwise trade —

are allowed a refund of nearly the entire tolls, while those bound for American ports are not allowed any such advantage.

To promise equality and then in practice make it conditional

upon our vessels doing Canadian business instead of their own, is to fulfill a promise with the shadow of performance.

Upon the representations of the United States embodying that view, Canada retired from the position which she had taken, rescinded the provision for differential tolls, and put American trade going to American markets on the same basis of tolls as Canadian trade going to Canadian markets. She did not base her action upon any idea that there was no competition between trade to American ports and trade to Canadian ports, but she recognized the law of equality in good faith and honor; and to this day that law is being accorded to us, and by each great Nation to the other.

I have said, Mr. President, that the Clayton-Bulwer Treaty was sought by us. In seeking it we declared to Great Britain what it was that we sought. I ask the Senate to listen to the declaration that we made to induce Great Britain to enter into that treaty — to listen to it because it is the declaration by which we are in honor bound as truly as if it were signed and sealed.

Here I will read from the report made to the Senate on the 5th day of April, 1900, by Senator Cushman K. Davis, then chairman of the Committee on Foreign Relations. So you will perceive that this is no new matter to the Senate of the United States, and that I am not proceeding upon my own authority in thinking it worthy of your attention.

Mr. Rives was instructed to say and did say to Lord Palmerston, in urging upon him the making of the Clayton-Bulwer Treaty, this:

The United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication, and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all.

That the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind.

That, sir, was the spirit of the Clayton-Bulwer Convention. That was what the United States asked Great Britain to agree upon. That self-denying declaration underlay and permeated and found expression in the terms of the Clayton-Bulwer Convention. And upon that representation Great Britain in that convention relinquished her coign of vantage which she herself had for the benefit of her great North American empire for the control of the canal across the Isthmus.

MR. CUMMINS. The Senator has stated that at the time of the Clayton-Bulwer Treaty we were excluded from the Mosquito Coast by the protectorate exercised by Great Britain over that coast. My question is this: Had we not at that time a treaty with New Granada that gave us equal or greater rights upon the Isthmus of Panama than were claimed even by Great Britain over the Mosquito Coast?

MR. ROOT. Mr. President, we had the Treaty of 1846 with New Granada, under which we undertook to protect any railway or canal across the Isthmus. But that did not apply to the Nicaragua route, which was then supposed to be the most available route for a canal.

MR. CUMMINS. I quite agree with the Senator about that. I only wanted it to appear in the course of the argument that we were then under no disability so far as concerned building a canal across the Isthmus of Panama.

MR. ROOT. We were under a disability so far as concerned building a canal by the Nicaragua route, which was regarded as the available route until the discussion in the Senate after 1901, in which Senator Spooner and Senator Hanna practically changed the judgment of the Senate with regard to what was the proper route to take. And in the Treaty of 1850, so anxious were we to secure freedom from the claims of Great Britain on the eastern end of the Nicaragua route that, as I have read, we agreed that the same contract should apply, not merely to the Nicaragua route,

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but to the whole of the Isthmus. So that, from that time on, the whole Isthmus was impressed by the same obligations which were impressed upon the Nicaragua route, and whatever rights we had under our Treaty of 1846 with New Granada we were thenceforth bound to exercise with due regard and subordination to the provisions of the Clayton-Bulwer Treaty.

Mr. President, after the lapse of some thirty years, during the early part of which we were strenuously insisting upon the observance by Great Britain of her obligations under the Clayton-Bulwer Treaty and during the latter part of which we were beginning to be restive under our obligations by reason of that treaty, we undertook to secure a modification of it from Great Britain. In the course of that undertaking there was much discussion and some difference of opinion as to the continued obligations of the treaty. But I think that was finally put at rest by the decision of Secretary Olney in the memorandum upon the subject made by him in the year 1896. In that memorandum he said:

Under these circumstances, upon every principle which governs the relation to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor.

If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter.

We did apply to Great Britain for a reconsideration of the whole matter, and the result of the application was the Hay-Pauncefote Treaty. That treaty came before the Senate in two forms: First, in the form of an instrument signed on the 5th of February, 1900, which was amended by the Senate; and, second, in the form of an instrument

signed on the 18th of November, 1901, which continued the greater part of the provisions of the earlier instrument, but somewhat modified or varied the amendments which had been made by the Senate to that earlier instrument.

It is really but one process by which the paper sent to the Senate in February, 1900, passed through a course of amendment; first, at the hands of the Senate, and then at the hands of the negotiators between Great Britain and the United States, with the subsequent approval of the Senate. In both the first form and the last of this treaty the preamble provides for preserving the provisions of article 8 of the Clayton-Bulwer Treaty. Both forms provide for the construction of the canal under the auspices of the United States alone, instead of its construction under the auspices of both countries.

Both forms of that treaty provide that the canal might be

constructed under the auspices of the Government of the United States, either directly at its own cost or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares —

that being substituted for the provisions of the Clayton-Bulwer Treaty under which both countries were to be patrons of the enterprise.

Under both forms it was further provided that —

Subject to the provisions of the present convention, the said Government —

The United States —

shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

That provision, however, for the exclusive patronage of the United States was subject to the initial provision that the modification or change from the Clayton-Bulwer Treaty

was to be for the construction of such canal under the auspices of the Government of the United States, without impairing the general principle of neutralization established in article 8 of that convention.

Then the treaty, as it was finally agreed to, provides that the United States "adopt, as the basis of such neutralization of such ship canal," the following rules, substantially as embodied in the convention "of Constantinople, signed the 29th of October, 1888," for the free navigation of the Suez Maritime Canal; that is to say:

First. The canal shall be free and open . . . to the vessels of commerce and of war of all nations "observing these rules on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect to the conditions or charges of traffic, or otherwise." Such conditions and charges of traffic shall be just and equitable.

Then follow rules relating to blockade and vessels of war, the embarkation and disembarkation of troops, and the extension of the provisions to the waters adjacent to the canal.

Now, Mr. President, that rule must, of course, be read in connection with the provision for the preservation of the principle of neutralization established in article 8 of the Clayton-Bulwer Convention.

Let me take your minds back again to article 8 of the Clayton-Bulwer Convention, consistently with which we are bound to construe the rule established by the Hay-Pauncefote Convention. The principle of neutralization provided for by the eighth article is neutralization upon terms of absolute equality both between the United States and Great Britain and between the United States and all other powers.

It is always understood —

Says the eighth article —

by the United States and Great Britain that the parties constructing or owning the same —

That is, the canal —

shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable, and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

Now, we are not at liberty to put any construction upon the Hay-Pauncefote Treaty which violates that controlling declaration of absolute equality between the citizens and subjects of Great Britain and the United States.

Mr. President, when the Hay-Pauncefote Convention was ratified by the Senate it was in full view of this controlling principle, in accordance with which their act must be construed, for Senator Davis, in his report from the Committee on Foreign Relations, to which I have already referred, said, after referring to the Suez Convention of 1888:

The United States cannot take an attitude of opposition to the principles of the great act of October 22, 1888, without discrediting the official declarations of our Government for fifty years on the neutrality of an Isthmian canal and its equal use by all nations without discrimination.

To set up the selfish motive of gain by establishing a monopoly of a highway that must derive its income from the patronage of all maritime countries would be unworthy of the United States, if we owned the country through which the canal is to be built.

But the location of the canal belongs to other Governments, from whom we must obtain any right to construct a canal on their territory, and it is not unreasonable, if the question was new and was not involved in a subsisting treaty with Great Britain, that she should question the right of even Nicaragua and Costa Rica to grant to our ships of commerce and of war extraordinary privileges of transit through the canal.

I shall revert to that principle declared by Senator Davis. I continue the quotation:

It is not reasonable to suppose that Nicaragua and Costa Rica would grant to the United States the exclusive control of a canal through those States on terms less generous to the other maritime nations than those prescribed in the great act of October 22, 1888, or, if we could compel them to give us such advantages over other nations, it would not be creditable to our country to accept them.

That our Government or our people will furnish the money to build the canal presents the single question whether it is profitable to do so. If the canal, as property, is worth more than its cost, we are not called on to divide the profits with other nations. If it is worth less and we are compelled by national necessities to build the canal, we have no right to call on other nations to make up the loss to us. In any view, it is a venture that we will enter upon if it is to our interest, and if it is otherwise we will withdraw from its further consideration.

The Suez Canal makes no discrimination in its tolls in favor of its stockholders, and, taking its profits or the half of them as our basis of calculation, we will never find it necessary to differentiate our rates of toll in favor of our own people in order to secure a very great profit on the investment.

Mr. President, in view of that declaration of principle, in the face of that declaration, the United States cannot afford to take a position at variance with the rule of universal equality established in the Suez Canal Convention — equality as to every stockholder and all non-stockholders, equality as to every nation whether in possession or out of possession. In the face of that declaration the United States cannot afford to take any other position than upon the rule of universal equality of the Suez Canal Convention, and upon the further declaration that the country owning the territory through which this canal was to be built would not and ought not to give any special advantage or preference to the United States as compared with all the other nations of the earth. In view of that report, the Senate rejected the amendment which was offered by Senator

Bard, of California, providing for preference to the coast-wise trade of the United States. This is the amendment which was proposed:

The United States reserves the right in the regulation and management of the canal to discriminate in respect of the charges of traffic in favor of vessels of its own citizens engaged in the coast-wise trade.

I say the Senate rejected that amendment upon this report, which declared the rule of universal equality without any preference or discrimination in favor of the United States as being the meaning of the treaty and the necessary meaning of the treaty.

There was still more before the Senate, there was still more before the country to fix the meaning of the treaty. I have read the representations that were made, the solemn declarations made by the United States to Great Britain establishing the rule of absolute equality without discrimination in favor of the United States or its citizens to induce Great Britain to enter into the Clayton-Bulwer Treaty.

Now, let me read the declaration made to Great Britain to induce her to modify the Clayton-Bulwer Treaty and give up her right to joint control of the canal and put in our hands the sole power to construct it or patronize it or control it.

Mr. Blaine said in his instructions to Mr. Lowell on June 24, 1881, directing Mr. Lowell to propose to Great Britain the modification of the Clayton-Bulwer Treaty, — I read his words:

The United States recognizes a proper guaranty of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama, and in the last generation every step was taken by this Government that is deemed requisite in the premises. The necessity was foreseen and abundantly provided for, long in advance of any possible call for the actual exercise of power. . . . *Nor, in time of peace, does the United States seek to have any exclusive privileges accorded to American ships in respect*

*to precedence or tolls through an interoceanic canal any more than it has sought like privileges for American goods in transit over the Panama Railway, under the exclusive control of an American corporation. The extent of the privileges of American citizens and ships is measurable under the Treaty of 1846 by those of Colombian citizens and ships. It would be our earnest desire and expectation to see the world's peaceful commerce enjoy the same just, liberal, and rational treatment.*

— Again, he said to Great Britain:

The United States, as I have before had occasion to assure your Lordship, *demand no exclusive privileges in these passages, but will always exert their influence to secure their free and unrestricted benefits, both in peace and war, to the commerce of the world.*

Mr. President, it was upon that declaration, upon that self-denying declaration, upon that solemn assurance, that the United States sought not and would not have any preference for its own citizens over the subjects and citizens of other countries that Great Britain abandoned her rights under the Clayton-Bulwer Treaty and entered into the Hay-Pauncefote Treaty, with the clause continuing the principles of clause 8, which embodied these same declarations, and the clause establishing the rule of equality taken from the Suez Canal Convention. We are not at liberty to give any other construction to the Hay-Pauncefote Treaty than the construction which is consistent with that declaration.

Mr. President, these declarations, made specifically and directly to secure the making of these treaties, do not stand alone. For a longer period than the oldest Senator has lived, the United States has been from time to time making open and public declarations of her disinterestedness, her altruism, her purposes for the benefit of mankind, her freedom from desire or willingness to secure special and peculiar advantage in respect of transit across the Isthmus. In 1826 Mr. Clay, then Secretary of State in the Cabinet of John Quincy Adams, said, in his instructions to the delegates to the Panama Congress of that year:

If a canal across the Isthmus be opened "so as to admit of the passage of sea vessels from ocean to ocean, the benefit of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation for reasonable tolls."

Mr. Cleveland, in his annual message of 1885, said:

The lapse of years has abundantly confirmed the wisdom and foresight of those earlier administrations which, long before the conditions of maritime intercourse were changed and enlarged by the progress of the age, proclaimed the vital need of interoceanic transit across the American Isthmus and consecrated it in advance to the common use of mankind by their positive declarations and through the formal obligations of treaties. Toward such realization the efforts of my administration will be applied, ever bearing in mind the principles on which it must rest and which were declared in no uncertain tones by Mr. Cass, who, while Secretary of State in 1858, announced that "What the United States want in Central America, next to the happiness of its people, is the security and neutrality of the interoceanic routes which lead through it."

By public declarations, by the solemn asseverations of our treaties with Colombia in 1846, with Great Britain in 1850, our treaties with Nicaragua, our treaty with Great Britain in 1901, our treaty with Panama in 1903, we have presented to the world the most unequivocal guaranty of disinterested action for the common benefit of mankind and not for our selfish advantage.

In the message which was sent to Congress by President Roosevelt on the 4th of January, 1904, explaining the course of this Government regarding the revolution in Panama and the making of the treaty by which we acquired all the title that we have upon the Isthmus, President Roosevelt said:

If ever a Government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal.

Mr. President, there has been much discussion for many



years among authorities upon international law as to whether artificial canals for the convenience of commerce did not partake of the character of natural passageways to such a degree that, by the rules of international law, equality must be observed in the treatment of mankind by the nation which has possession and control. Many very high authorities have asserted that that rule applies to the Panama Canal even without a treaty. We base our title upon the right of mankind in the Isthmus, treaty or no treaty. We have long asserted, beginning with Secretary Cass, that the nations of Central America had no right to debar the world from its right of passage across the Isthmus. Upon that view, in the words which I have quoted from President Roosevelt's message to Congress, we base the justice of our entire action upon the Isthmus, which resulted in our having the Canal Zone. We could not have taken it for our selfish interest; we could not have taken it for the purpose of securing an advantage to the people of the United States over the other peoples of the world; it was only because civilization had its rights to passage across the Isthmus and because we made ourselves the mandatory of civilization to assert those rights that we are entitled to be there at all. On the principles which underlie our action and upon all the declarations that we have made for more than half a century, as well as upon the express and positive stipulations of our treaties, we are forbidden to say we have taken the custody of the Canal Zone to give ourselves any right of preference over the other civilized nations of the world beyond those rights which go to the owner of a canal to have the tolls that are charged for passage.

Well, Mr. President, asserting that we were acting for the common benefit of mankind, willing to accept no preferential right of our own, just as we asserted it to secure the Clayton-Bulwer Treaty, just as we asserted it to secure the

Hay-Pauncefote Treaty, when we had recognized the Republic of Panama, we made a treaty with her on the 18th of November, 1903. I ask your attention now to the provisions of that treaty. In that treaty both Panama and the United States recognize the fact that the United States was acting, not for its own special and selfish interest, but in the interest of mankind.

The suggestion has been made that we are relieved from the obligations of our treaties with Great Britain because the Canal Zone is our territory. It is said that, because it has become ours, we are entitled to build the canal on our own territory and do what we please with it. Nothing can be further from the fact. It is not our territory, except in trust. Article 2 of the treaty with Panama provides:

The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal —

and for no other purpose —

of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed.

. . . . .  
The Republic of Panama further grants to the United States in perpetuity the use, occupation, and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said enterprise.

Article 3 provides:

The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in article 2 of this agreement —

from which I have just read —

and within the limits of all auxiliary lands and waters mentioned and described in said article 2, which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.

Article 5 provides:

The Republic of Panama grants to the United States in perpetuity a monopoly for the construction, maintenance, and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

I now read from article 18:

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by section 1 of article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

So, Mr. President, far from our being relieved of the obligations of the treaty with Great Britain by reason of the title that we have obtained to the Canal Zone, we have taken that title, impressed with a solemn trust. We have taken it for no purpose except the construction and maintenance of a canal in accordance with all the stipulations of our treaty with Great Britain. We cannot be false to those stipulations without adding to the breach of contract a breach of the trust which we have assumed, according to our own declarations, for the benefit of mankind as the mandatory of civilization.

In anticipation of the plainly-to-be-foreseen contingency of our having to acquire some kind of title in order to construct the canal, the Hay-Pauncefote Treaty provided expressly in article 4:

It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neu-

tralization or the obligation of the high contracting parties under the present treaty.

So you will see that the treaty with Great Britain expressly provides that its obligations shall continue, no matter what title we get to the Canal Zone; and the treaty by which we get the title expressly impresses upon it as a trust the obligations of the treaty with Great Britain. How idle it is to say that because the Canal Zone is ours we can do with it what we please.

There is another suggestion made regarding the obligations of this treaty, and that is that matters relating to the coasting trade are matters of special domestic concern, and that nobody else has any right to say anything about them. We did not think so when we were dealing with the Canadian canals. But that may not be conclusive as to rights under this treaty. But examine it for a moment.

It is rather poverty of language than a genius for definition which leads us to call a voyage from New York to San Francisco, passing along countries thousands of miles away from our territory, "coasting trade," or to call a voyage from New York to Manila, on the other side of the world, "coasting trade." When we use the term "coasting trade," what we really mean is that under our navigation laws a voyage which begins and ends at an American port has certain privileges and immunities and rights, and it is necessarily in that sense that the term is used in this statute. It must be construed in accordance with our statutes.

Sir, I do not for a moment dispute that ordinary coasting trade is a special kind of trade that is entitled to be treated differently from trade to or from distant foreign points. It is ordinarily neighborhood trade, from port to port, by which the people of a country carry on their intercommunication, often by small vessels, poor vessels, carrying cargoes of slight value. It would be quite impracticable to

impose upon trade of that kind the same kind of burdens which great ocean-going steamers, trading to the farthest parts of the earth, can well bear. We make that distinction. Indeed, Great Britain herself makes it, although Great Britain admits all the world to her coasting trade. But it is by quite a different basis of classification — that is, the statutory basis — that we call a voyage from the eastern coast of the United States to the Orient a coasting voyage, because it begins and ends in an American port.

This is a special, peculiar kind of trade which passes through the Panama Canal. You may call it “coasting trade,” but it is unlike any other coasting trade. It is special and peculiar to itself.

Grant that we are entitled to fix a different rate of tolls for that class of trade from that which would be fixed for other classes of trade. Ah, yes; but Great Britain has her coasting trade through the canal under the same definition, and Mexico has her coasting trade, and Germany has her coasting trade, and Colombia has her coasting trade, in the same sense that we have. You are not at liberty to discriminate in fixing tolls between a voyage from Portland, Maine, to Portland, Oregon, by an American ship, and a voyage from Halifax to Victoria in a British ship, or a voyage from Vera Cruz to Acapulco in a Mexican ship, because when you do so you discriminate, not between coasting trade and other trade, but between American ships and British ships, Mexican ships, or Colombian ships. That is a violation of the rule of equality which we have solemnly adopted, and asserted and reasserted, and to which we are bound by every consideration of honor and good faith. Whatever this treaty means, it means for that kind of trade as well as for any other kind of trade.

The suggestion has been made, also, that we should not consider that the provision in this treaty about equality as to tolls really means what it says, because it is not to be

supposed that the United States would give up the right to defend itself, to protect its own territory, to land its own troops, and to send through the canal as it pleases its own ships of war. That is disposed of by the considerations which were presented to the Senate in the Davis report, to which I have already referred, in regard to the Suez Convention.

The Suez Convention, from which these rules of the Hay-Pauncefote Treaty were taken almost — though not quite — textually, contained other provisions which reserved to Turkey and to Egypt, as sovereigns of the territory through which the canal passed, — Egypt as the sovereign and Turkey as the suzerain over Egypt, — all of the rights that pertained to sovereigns for the protection of their own territory. As when the Hay-Pauncefote Treaty was made neither party to the treaty had any title to the region which would be traversed by the canal, no such clauses could be introduced. But, as was pointed out, the rules which were taken from the Suez Canal for the control of the canal management would necessarily be subject to these rights of sovereignty which were still to be secured from the countries owning the territory. That is recognized by the British Government in the note which has been sent to us and has been laid before the Senate, or is in the possession of the Senate, from the British Foreign Office.

In Sir Edward Grey's note of November 14, 1912, he says what I am about to read. This is an explicit disclaimer of any contention that the provisions of the Hay-Pauncefote Treaty exclude us from the same rights of protection of territory which Nicaragua or Colombia or Panama would have had as sovereigns, and which we succeed to, *pro tanto*, by virtue of the Panama Canal Treaty.

Sir Edward Grey says:

I notice that in the course of the debate in the Senate on the Panama Canal Bill the argument was used by one of the speakers

that the third, fourth, and fifth rules embodied in article 3 of the treaty show that the words "all nations" cannot include the United States, because, if the United States were at war, it is impossible to believe that it could be intended to be debarred by the treaty from using its own territory for revictualling its warships or landing troops.

The same point may strike others who read nothing but the text of the Hay-Pauncefote Treaty itself, and I think it is therefore worth while that I should briefly show that this argument is not well founded.

I read this not as an argument, but because it is a formal, official disclaimer which is binding.

Sir Edward Grey proceeds:

The Hay-Pauncefote Treaty of 1901 aimed at carrying out the principle of the neutralization of the Panama Canal by subjecting it to the same régime as the Suez Canal. Rules 3, 4, and 5 of article 3 of the treaty are taken almost textually from articles 4, 5, and 6 of the Suez Canal Convention of 1888. At the date of the signature of the Hay-Pauncefote Treaty the territory on which the Isthmian Canal was to be constructed did not belong to the United States, consequently there was no need to insert in the draft treaty provisions corresponding to those in articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that articles 4 and 5 shall not affect the right of Turkey, as the local sovereign, and of Egypt, within the measure of her autonomy, to take such measures as may be necessary for securing the defense of Egypt and the maintenance of public order, and, in the case of Turkey, the defense of her possessions on the Red Sea.

Now that the United States has become the practical sovereign of the canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection.

Mr. President, Great Britain has asserted the construction of the Hay-Pauncefote Treaty of 1901, the arguments for which I have been stating to the Senate. I realize, sir, that I may be wrong. I have often been wrong. I realize that the gentlemen who have taken a different view regarding the meaning of this treaty may be right. I do not

think so. But their ability and fairness of mind would make it idle for me not to entertain the possibility that they are right and I am wrong. Yet, Mr. President, the question whether they are right and I am wrong depends upon the interpretation of the treaty. It depends upon the interpretation of the treaty in the light of all the declarations that have been made by the parties to it, in the light of the nature of the subject-matter with which it deals.

Gentlemen say the question of imposing tolls or not imposing tolls upon our coastwise commerce is a matter of our concern. Ah! we have made a treaty about it. If the interpretation of the treaty is as England claims, then it is not a matter of our concern; it is a matter of treaty rights and duties. But, sir, it is not a question as to our rights to remit tolls to our commerce. It is a question whether we can impose tolls upon British commerce when we have remitted them from our own. That is the question. Nobody disputes our right to allow our own ships to go through the canal without paying tolls. What is disputed is our right to charge tolls against other ships when we do not charge them against our own. That is, pure and simple, a question of international right and duty, and depends upon the interpretation of the treaty.

Sir, we have another treaty, made between the United States and Great Britain on the 4th of April, 1908, in which the two nations have agreed as follows:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting States, and do not concern the interests of third parties.

Of course, the question of the rate of tolls on the Panama



Canal does not affect any nation's vital interests. It does not affect the independence or the honor of either of these contracting States. We have a difference relating to the interpretation of this treaty, and that is all there is to it. We are bound, by this treaty of arbitration, not to stand with arrogant assertion upon our own Government's opinion as to the interpretation of the treaty, not to require that Great Britain shall suffer what she deems injustice by violation of the treaty, or else go to war. We are bound to say, "We keep the faith of our treaty of arbitration, and we will submit the question as to what this treaty means to an impartial tribunal of arbitration."

Mr. President, if we stand in the position of arrogant refusal to submit the questions arising upon the interpretation of this treaty to arbitration, we shall not only violate our solemn obligation, but we shall be false to all the principles that we have asserted to the world, and that we have urged upon mankind. We have been the apostle of arbitration. We have been urging it upon the other civilized nations. Presidents, Secretaries of State, Ambassadors, and Ministers — aye, Congresses, the Senate and the House, all branches of our Government have committed the United States to the principle of arbitration irrevocably, unequivocally, and we have urged it in season and out of season on the rest of mankind.

Sir, I cannot detain the Senate by more than beginning upon the expressions that have come from our Government upon this subject, but I will ask your indulgence while I call your attention to a few selected from the others.

On the 9th of June, 1874, the Senate Committee on Foreign Relations reported and the Senate adopted this resolution:

*Resolved*, That the United States, having at heart the cause of peace everywhere, and hoping to help its permanent establishment between nations, hereby recommend the adoption of arbitration

as a great and practical method for the determination of international difference, to be maintained sincerely and in good faith, so that war may cease to be regarded as a proper form of trial between nations.

On the 17th of June, 1874, the Committee on Foreign Affairs of the House adopted this resolution:

WHEREAS war is at all times destructive of the material interests of a people, demoralizing in its tendencies, and at variance with an enlightened public sentiment; and whereas *differences between nations should in the interests of humanity and fraternity be adjusted, if possible, by international arbitration* : Therefore,

*Resolved*, That the people of the United States, being devoted to the policy of peace with all mankind, enjoining its blessings and hoping for its permanence and its universal adoption, hereby through their representatives in Congress recommend such arbitration as a rational substitute for war; and they further recommend to the treaty-making power of the Government to provide, if practicable, that hereafter in treaties made between the United States and foreign powers war shall not be declared by either of the contracting parties against the other until efforts shall have been made to adjust all alleged cause of difference by impartial arbitration.

On the same 17th of June, 1874, the Senate adopted this resolution:

*Resolved, etc.*, That the President of the United States is hereby authorized and requested to negotiate with all civilized powers who may be willing to enter into such negotiations for the establishment of an international system whereby matters in dispute between different Governments agreeing thereto may be adjusted by arbitration, and, if possible, without recourse to war.

On the 14th of June, 1888, and again on the 14th of February, 1890, the Senate and the House adopted a concurrent resolution in the words which I now read:

*Resolved by the Senate (the House of Representatives concurring)*, That the President be, and is hereby, requested to invite, from time to time, as fit occasions may arise, negotiations with any Government with which the United States has, or may have,

diplomatic relations, to the end that any differences or disputes arising between the two Governments which cannot be adjusted by diplomatic agency may be referred to arbitration and be peaceably adjusted by such means.

This was concurred in by the House on the 3d of April, 1890.

Mr. President, in pursuance of those declarations by both Houses of Congress the Presidents and the Secretaries of State and the diplomatic agents of the United States, doing their bounden duty, have been urging arbitration upon the people of the world. Our representatives in The Hague Conference of 1899, and in The Hague Conference of 1907, and in the Pan-American Conference in Washington, and in the Pan-American Conference in Mexico, and in the Pan-American Conference in Rio de Janeiro were instructed to urge and did urge and pledge the United States in the most unequivocal and urgent terms to support the principle of arbitration upon all questions capable of being submitted to a tribunal for a decision.

Under those instructions Mr. Hay addressed the people of the entire civilized world with the request to come into treaties of arbitration with the United States. Here was his letter. After quoting from the resolutions and from expressions by the President he said:

Moved by these views, the President has charged me to instruct you to ascertain whether the Government to which you are accredited, which he has reason to believe is equally desirous of advancing the principle of international arbitration, is willing to conclude with the Government of the United States an arbitration treaty of like tenor to the arrangement concluded between France and Great Britain on October 14, 1903.

That was the origin of this treaty. The treaties made by Mr. Hay were not satisfactory to the Senate because of the question about the participation of the Senate in the make-up of the special agreement of submission. Mr. Hay's successor modified that on conference with the Committee

on Foreign Relations of the Senate, and secured the assent of the other countries of the world to the treaty with that modification. We have made twenty-five of these treaties of arbitration, covering the greater part of the world, under the direction of the Senate of the United States and the House of Representatives of the United States and in accordance with the traditional policy of the United States, holding up to the world the principle of peaceful arbitration.

One of these treaties is here, and under it Great Britain is demanding that the question as to what the true interpretation of our treaty about the canal is shall be submitted to decision and not be made the subject of war or of submission to what she deems injustice to avoid war.

In response to the last resolution which I have read, the concurrent resolution passed by the Senate and the House requesting the President to enter into the negotiations which resulted in these treaties of arbitration, the British House of Commons passed a resolution accepting the overture. On the 16th of July, 1893, the House of Commons adopted this resolution:

*Resolved*, That this house has learnt with satisfaction that both Houses of the United States Congress have, by resolution, requested the President to invite from time to time, as fit occasions may arise, negotiations with any Government with which the United States have or may have diplomatic relations, to the end that any differences or disputes arising between the two Governments which cannot be adjusted by diplomatic agency may be referred to arbitration and peaceably adjusted by such means, and that this house, cordially sympathizing with the purpose in view, expresses the hope that Her Majesty's Government will lend their ready coöperation to the Government of the United States upon the basis of the foregoing resolution.

Her Majesty's Government did, and thence came this treaty.

Mr. President, what revolting hypocrisy we convict our-

selves of, if, after all this, the first time there comes up a question in which we have an interest, the first time there comes up a question of difference about the meaning of a treaty as to which we fear we may be beaten in an arbitration, we refuse to keep our agreement! Where will be our self-respect if we do that? Where will be that respect to which a great nation is entitled from the other nations of the earth?

I have read from what Congress has said.

Let me read something from President Grant's annual message of December 4, 1871. He is commenting upon the arbitration provisions of the Treaty of 1871, in which Great Britain submitted to arbitration our claims against her, known as the Alabama claims, in which Great Britain submitted those claims where she stood possibly to lose but not possibly to gain anything, and submitted them against the most earnest and violent protest of many of her own citizens. General Grant said:

The year has been an eventful one in witnessing two great nations speaking one language and having one lineage, settling by peaceful arbitration disputes of long standing and liable at any time to bring those nations into costly and bloody conflict. An example has been set which, if successful in its final issue, may be followed by other civilized nations and finally be the means of returning to productive industry millions of men now maintained to settle the disputes of nations by the bayonet and by broadside.

Under the authority of these resolutions our delegates in the first Pan-American Conference at Washington secured the adoption of this resolution April 18, 1890:

Article 1. The Republics of North, Central, and South America hereby adopt arbitration as a principle of American international law for the settlement of the differences, disputes, or controversies that may arise between two or more of them.

And this:

The International American Conference resolves that this conference, having recommended arbitration for the settlement of

disputes among the Republics of America, begs leave to express the wish that controversies between them and the nations of Europe may be settled in the same friendly manner.

It is further recommended that the Government of each nation herein represented communicate this wish to all friendly powers.

Upon that Mr. Blaine, that most vigorous and virile American, in his address as the presiding officer of that first Pan-American Conference in Washington said:

If, in this closing hour, the conference had but one deed to celebrate we should dare call the world's attention to the deliberate, confident, solemn dedication of two great continents to peace and to the prosperity which has peace for its foundation. We hold up this new Magna Charta, which abolishes war and substitutes arbitration between the American Republics, as the first and great fruit of the International American Conference. That noblest of Americans, the aged poet and philanthropist, Whittier, is the first to send his salutation and his benediction, declaring, "If in the spirit of peace the American conference agrees upon a rule of arbitration which shall make war in this hemisphere well-nigh impossible, its sessions will prove one of the most important events in the history of the world."

President Arthur, in his annual message of December 4, 1882, said, in discussing the proposition for a Pan-American Conference:

I am unwilling to dismiss this subject without assuring you of my support of any measure the wisdom of Congress may devise for the promotion of peace on this continent and throughout the world, and I trust the time is nigh when, with the universal assent of civilized peoples, all international differences shall be determined without resort to arms by the benignant processes of arbitration.

President Harrison, in his message of December 3, 1889, said concerning the Pan-American Conference:

But while the commercial results which it is hoped will follow this conference are worthy of pursuit and of the great interests they have excited, it is believed that the crowning benefit will be found in the better securities which may be devised for the maintenance of peace among all American nations and the settlement

of all contentions by methods that a Christian civilization can approve.

President Cleveland, in his message of December 4, 1893, said, concerning the resolution of the British Parliament of July 16, 1893, which I have already read, and commenting on the concurrent resolution of February 14 and April 18, 1890:

It affords me signal pleasure to lay this parliamentary resolution before the Congress and to express my sincere gratification that the sentiment of two great kindred nations is thus authoritatively manifested in favor of the rational and peaceable settlement of international quarrels by honorable resort to arbitration.

President McKinley, in his message of December 6, 1897, said:

International arbitration cannot be omitted from the list of subjects claiming our consideration. Events have only served to strengthen the general views on this question expressed in my inaugural address. The best sentiment of the civilized world is moving toward the settlement of differences between nations without resorting to the horrors of war. Treaties embodying these humane principles on broad lines without in any way imperilling our interests or our honor shall have my constant encouragement.

President Roosevelt, in his message of December 3, 1905, said:

I earnestly hope that the conference —  
the second Hague Conference —

may be able to devise some way to make arbitration between nations the customary way of settling international disputes in all save a few classes of cases, which should themselves be sharply defined and rigidly limited as the present governmental and social development of the world will permit. If possible, there should be a general arbitration treaty negotiated among all nations represented at the conference.

Oh, Mr. President, are we Pharisees? Have we been insincere and false? Have we been pretending in all these long years of resolution and declaration and proposal and

urgency for arbitration? Are we ready now to admit that our country, that its Congresses and its Presidents, have all been guilty of false pretense, of humbug, of talking to the galleries, of fine words to secure applause, and that the instant we have an interest we are ready to falsify every declaration, every promise, and every principle? But we must do that if we arrogantly insist that we alone will determine upon the interpretation of this treaty and will refuse to abide by the agreement of our treaty of arbitration.

Mr. President, what is all this for? Is the game worth the candle? Is it worth while to put ourselves in a position and to remain in a position to maintain which we may be driven to repudiate our principles, our professions, and our agreements for the purpose of conferring a money benefit, — not very great, not very important, but a money benefit, — at the expense of the Treasury of the United States, upon the most highly and absolutely protected special industry in the United States? Is it worth while? We refuse to help our foreign shipping, which is in competition with the lower wages and the lower standard of living of foreign countries, and we are proposing to do this for a part of our coastwise shipping which has now by law the absolute protection of a statutory monopoly and which needs no help.

Mr. President, there is but one alternative consistent with self-respect. We must arbitrate the interpretation of this treaty or we must retire from the position we have taken.

O Senators, consider for a moment what it is that we are doing. We all love our country; we are all proud of its history; we are all full of hope and courage for its future; we love its good name; we desire for it that power among the nations of the earth which will enable it to accomplish still greater things for civilization than it has accomplished



in its noble past. Shall we make ourselves in the minds of the world like unto the man who in his own community is marked as astute and cunning to get out of his obligations? Shall we make ourselves like unto the man who is known to be false to his agreements; false to his pledged word? Shall we have it understood the whole world over that "you must look out for the United States or she will get the advantage of you"; that we are clever and cunning to get the better of the other party to an agreement, and that at the end —

MR. BRANDEGEE. "Slippery" would be a better word.

MR. ROOT. Yes; I thank the Senator for the suggestion — "slippery." Shall we in our generation add to those claims to honor and respect that our fathers have established for our country good cause that we shall be considered "slippery"?

It is worth while, Mr. President, to be a citizen of a great country, but size alone is not enough to make a country great. A country must be great in its ideals; it must be great-hearted; it must be noble; it must despise and reject all smallness and meanness; it must be faithful to its word; it must keep the faith of treaties; it must be faithful to its mission of civilization in order that it shall be truly great. It is because we believe that of our country that we are proud, aye, that the alien with the first step of his foot upon our soil is proud to be a part of this great democracy.

Let us put aside the idea of small, petty advantage; let us treat this situation and these obligations in our relation to this canal in that large way which befits a great nation.

Mr. President, how sad it would be if we were to dim the splendor of that great achievement by drawing across it the mark of petty selfishness; if we were to diminish and reduce for generations to come the power and influence of this free Republic for the uplifting and the progress of mankind by

destroying the respect of mankind for us! How sad it would be if you and I, Senators, were to make ourselves responsible for destroying that bright and inspiring ideal which has enabled free America to lead the world in progress toward liberty and justice!

## 4. SPEECH ON THE SLAVERY QUESTION

*By John C. Calhoun, Senator from South Carolina.<sup>1</sup> Read in the Senate March 4, 1850, by James M. Mason, Senator from Virginia*

THIS speech is said to mark the culmination of Calhoun's political career. Although seriously ill, he came to the Senate on March 4, but, at the urgent advice of his friends, he did not undertake the physical strain of delivering the speech that he had carefully prepared; he gave the manuscript to Senator James M. Mason, of Virginia, and Mr. Mason read it with dramatic effect, while Calhoun sat at his side. Calhoun was able to appear for a brief time on one or two subsequent occasions, but was too weak to speak at any length. Scarcely more than three weeks after the reading of this speech, the "Great Nullifier" died — March 31, 1850.

I HAVE, Senators, believed from the first that the agitation of the subject of slavery would, if not prevented by some timely and effective measure, end in disunion. Entertaining this opinion, I have, on all proper occasions, endeavored to call the attention of both the two great parties which divide the country to adopt some measure to prevent so great a disaster, but without success. The agitation has been permitted to proceed, with almost no attempt to resist it, until it has reached a point when it can no longer be disguised or denied that the Union is in danger. You have thus had forced upon you the greatest and the gravest question that can ever come under your consideration — How can the Union be preserved?

To give a satisfactory answer to this mighty question, it is indispensable to have an accurate and thorough knowledge of the nature and the character of the cause by which

<sup>1</sup> With slight alterations in punctuation, from *The Works of Calhoun*, edited by Richard K. Crallé (1857). By the kind permission of the publishers, D. Appleton & Co.

the Union is endangered. Without such knowledge it is impossible to pronounce, with any certainty, by what measure it can be saved; just as it would be impossible for a physician to pronounce, in the case of some dangerous disease, with any certainty, by what remedy the patient could be saved, without similar knowledge of the nature and character of the cause which produced it. The first question, then, presented for consideration, in the investigation I propose to make, in order to obtain such knowledge, is — What is it that has endangered the Union?

To this question there can be but one answer — That the immediate cause is the almost universal discontent which pervades all the States composing the Southern section of the Union. This widely extended discontent is not of recent origin. It commenced with the agitation of the slavery question, and has been increasing ever since. The next question, going one step further back, is — What has caused this widely diffused and almost universal discontent?

It is a great mistake to suppose, as is by some, that it originated with demagogues, who excited the discontent with the intention of aiding their personal advancement, or with the disappointed ambition of certain politicians, who resorted to it as the means of retrieving their fortunes. On the contrary, all the great political influences of the section were arrayed against excitement, and exerted to the utmost to keep the people quiet. The great mass of the people of the South were divided, as in the other section, into Whigs and Democrats. The leaders and the presses of both parties in the South were very solicitous to prevent excitement and to preserve quiet; because it was seen that the effects of the former would necessarily tend to weaken, if not destroy, the political ties which united them with their respective parties in the other section. Those who know the strength of party ties will readily appreciate the

immense force which this cause exerted against agitation, and in favor of preserving quiet. But, great as it was, it was not sufficient to prevent the widespread discontent which now pervades the section. No; some cause, far deeper and more powerful than the one supposed, must exist, to account for discontent so wide and deep. The question then recurs — What is the cause of this discontent? It will be found in the belief of the people of the Southern States, as prevalent as the discontent itself, that they cannot remain, as things now are, consistently with honor and safety, in the Union. The next question to be considered is — What has caused this belief?

One of the causes is, undoubtedly, to be traced to the long-continued agitation of the slave question on the part of the North, and the many aggressions which they have made on the rights of the South during the time. I will not enumerate them at present, as it will be done hereafter in its proper place.

There is another lying back of it — with which this is intimately connected — that may be regarded as the great and primary cause. This is to be found in the fact that the equilibrium between the two sections, in the Government as it stood when the Constitution was ratified and the Government put in action, has been destroyed. At that time there was nearly a perfect equilibrium between the two, which afforded ample means to each to protect itself against the aggression of the other; but, as it now stands, one section has the exclusive power of controlling the Government, which leaves the other without any adequate means of protecting itself against its encroachment and aggression. To place this subject distinctly before you, I have, Senators, prepared a brief statistical statement, showing the relative weight of the two sections in the Government under the first census of 1790 and the last census of 1840.

According to the former, the population of the United

States, including Vermont, Kentucky, and Tennessee, which then were in their incipient condition of becoming States but were not actually admitted, amounted to 3,997,827. Of this number the Northern States had 1,997,899, and the Southern 1,952,072, making a difference of only 45,827 in favor of the former States. The number of States, including Vermont, Kentucky, and Tennessee, were sixteen; of which eight, including Vermont, belonged to the Northern section, and eight, including Kentucky and Tennessee, to the Southern — making an equal division of the States between the two sections under the first census.

There was a small preponderance in the House of Representatives and in the Electoral College in favor of the Northern, owing to the fact that, according to the provisions of the Constitution, in estimating federal numbers five slaves count but three; but it was too small to affect sensibly the perfect equilibrium which, with that exception, existed at the time. Such was the equality of the two sections when the States composing them agreed to enter into a Federal Union. Since then the equilibrium between them has been greatly disturbed.

According to the last census the aggregate population of the United States amounted to 17,063,357, of which the Northern section contained 9,728,920, and the Southern 7,334,437, making a difference, in round numbers, of 2,400,000. The number of States had increased from sixteen to twenty-six, making an addition of ten States. In the mean time the position of Delaware had become doubtful as to which section she properly belonged. Considering her as neutral, the Northern States will have thirteen and the Southern States twelve, making a difference in the Senate of two Senators in favor of the former. According to the apportionment under the census of 1840, there were two hundred and twenty-three members of the House of

Representatives, of which the Northern States had one hundred and thirty-five, and the Southern States (considering Delaware as neutral) eighty-seven, making a difference in favor of the former in the House of Representatives of forty-eight. The difference in the Senate of two members, added to this, gives to the North, in the Electoral College, a majority of fifty. Since the census of 1840, four States have been added to the Union — Iowa, Wisconsin, Florida, and Texas. They leave the difference in the Senate as it stood when the census was taken; but add two to the side of the North in the House, making the present majority in the House in its favor fifty, and in the Electoral College fifty-two.

The result of the whole is to give the Northern section a predominance in every department of the Government, and thereby concentrate in it the two elements which constitute the Federal Government — majority of States, and a majority of their population, estimated in federal numbers. Whatever section concentrates the two in itself possesses the control of the entire Government.

But we are just at the close of the sixth decade and the commencement of the seventh. The census is to be taken this year, which must add greatly to the decided preponderance of the North in the House of Representatives and in the Electoral College. The prospect is, also, that a great increase will be added to its present preponderance in the Senate during the period of the decade, by the addition of new States. Two Territories, Oregon and Minnesota, are already in progress, and strenuous efforts are making to bring in three additional States from the territory recently conquered from Mexico; which, if successful, will add three other States in a short time to the Northern section, making five States; and increasing the present number of its States from fifteen to twenty, and of its Senators from thirty to forty. On the contrary, there is not a single

Territory in progress in the Southern section, and no certainty that any additional State will be added to it during the decade. The prospect, then, is that the two sections in the Senate, should the efforts now made to exclude the South from the newly acquired Territories succeed, will stand, before the end of the decade, twenty Northern States to fourteen Southern, (considering Delaware as neutral,) and forty Northern Senators to twenty-eight Southern. This great increase of Senators, added to the great increase of members of the House of Representatives and the Electoral College on the part of the North, which must take place under the next decade, will effectually and irretrievably destroy the equilibrium which existed when the Government commenced.

Had this destruction been the operation of time, without the interference of Government, the South would have had no reason to complain; but such was not the fact. It was caused by the legislation of this Government, which was appointed as the common agent of all and charged with the protection of the interests and security of all. The legislation by which it has been effected may be classed under three heads. The first is, that series of acts by which the South has been excluded from the common territory belonging to all the States as members of the Federal Union — which have had the effect of extending vastly the portion allotted to the Northern section, and restricting within narrow limits the portion left the South. The next consists in adopting a system of revenue and disbursements, by which an undue proportion of the burden of taxation has been imposed upon the South, and an undue proportion of its proceeds appropriated to the North; and the last is a system of political measures by which the original character of the Government has been radically changed. I propose to bestow upon each of these, in the order they stand, a few remarks, with the view of showing



that it is owing to the action of this Government that the equilibrium between the two sections has been destroyed, and the whole power of the system centered in a sectional majority.

The first of the series of acts by which the South was deprived of its due share of the Territories originated with the Confederacy which preceded the existence of this Government. It is to be found in the provision of the Ordinance of 1787. Its effect was to exclude the South entirely from that vast and fertile region which lies between the Ohio and the Mississippi Rivers, now embracing five States and one Territory. The next of the series is the Missouri Compromise, which excluded the South from that large portion of Louisiana which lies north of  $36^{\circ} 30'$ , excepting what is included in the State of Missouri. The last of the series excluded the South from the whole of the Oregon Territory. All these, in the slang of the day, were what are called slave Territories, and not free soil; that is, Territories belonging to slave-holding powers and open to the emigration of masters with their slaves. By these several acts the South was excluded from 1,238,025 square miles — an extent of country considerably exceeding the entire valley of the Mississippi. To the South was left the portion of the Territory of Louisiana lying south of  $36^{\circ} 30'$ , and the portion north of it included in the State of Missouri, with the portion lying south of  $36^{\circ} 30'$ , including the States of Louisiana and Arkansas, and the Territory lying west of the latter, and south of  $36^{\circ} 30'$ , called the Indian Country. These, with the Territory of Florida, now the State, make, in the whole, 283,503 square miles. To this must be added the territory acquired with Texas. If the whole should be added to the Southern section, it would make an increase of 325,520, which would make the whole left to the South 609,023. But a large part of Texas is still in contest between the two sections, which leaves it uncertain what will

be the real extent of the portion of territory that may be left to the South.

I have not included the territory recently acquired by the treaty with Mexico. The North is making the most strenuous efforts to appropriate the whole to herself, by excluding the South from every foot of it. If she should succeed, it will add to that from which the South has already been excluded 526,078 square miles, and would increase the whole which the North has appropriated to herself to 1,764,123, not including the portion that she may succeed in excluding us from in Texas. To sum up the whole, the United States, since they declared their independence, have acquired 2,373,046 square miles of territory, from which the North will have excluded the South, if she should succeed in monopolizing the newly acquired territories, about three fourths of the whole, leaving to the South but about one fourth.

Such is the first and great cause that has destroyed the equilibrium between the two sections in the Government.

The next is the system of revenue and disbursements which has been adopted by the Government. It is well known that the Government has derived its revenue mainly from duties on imports. I shall not undertake to show that such duties must necessarily fall mainly on the exporting States, and that the South, as the great exporting section of the Union, has, in reality, paid vastly more than her due proportion of the revenue; because I deem it unnecessary, as the subject has on so many occasions been fully discussed. Nor shall I, for the same reason, undertake to show that a far greater portion of the revenue has been disbursed at the North than its due share; and that the joint effect of these causes has been to transfer a vast amount from South to North, which, under an equal system of revenue and disbursements, would not have been lost to her. If to this be added that many of the duties

were imposed, not for revenue, but for protection, — that is, intended to put money, not in the treasury, but directly in the pocket of the manufacturers, — some conception may be formed of the immense amount which, in the long course of sixty years, has been transferred from South to North. There are no data by which it can be estimated with any certainty; but it is safe to say that it amounts to hundreds of millions of dollars. Under the most moderate estimate, it would be sufficient to add greatly to the wealth of the North, and thus greatly increase her population by attracting emigration from all quarters to that section.

This, combined with the great primary cause, amply explains why the North has acquired a preponderance in every department of the Government by its disproportionate increase of population and States. The former, as has been shown, has increased, in fifty years, 2,400,000 over that of the South. This increase of population, during so long a period, is satisfactorily accounted for by the number of emigrants and the increase of their descendants, which have been attracted to the Northern section from Europe and the South in consequence of the advantages derived from the causes assigned. If they had not existed — if the South had retained all the capital which has been extracted from her by the fiscal action of the Government; and, if she had not been excluded by the Ordinance of 1787 and the Missouri Compromise from the region lying between the Ohio and the Mississippi Rivers, and between the Mississippi and the Rocky Mountains north of  $36^{\circ} 30'$  — it scarcely admits of a doubt that she would have divided the emigration with the North, and, by retaining her own people, would have at least equalled the North in population under the census of 1840, and probably under that about to be taken. She would also, if she had retained her equal rights in those territories, have maintained an equality in the number of States with the North, and have pre-

served the equilibrium between the two sections that existed at the commencement of the Government. The loss, then, of the equilibrium is to be attributed to the action of this Government.

But while these measures were destroying the equilibrium between the two sections the action of the Government was leading to a radical change in its character, by concentrating all the power of the system in itself. The occasion will not permit me to trace the measures by which this great change has been consummated. If it did, it would not be difficult to show that the process commenced at an early period of the Government; and that it proceeded, almost without interruption, step by step, until it absorbed virtually its entire powers; but, without going through the whole process to establish the fact, it may be done satisfactorily by a very short statement.

That the Government claims and practically maintains the right to decide, in the last resort, as to the extent of its powers will scarcely be denied by any one conversant with the political history of the country. That it also claims the right to resort to force to maintain whatever power it claims, against all opposition, is equally certain. Indeed, it is apparent from what we daily hear that this has become the prevailing and fixed opinion of a great majority of the community. Now, I ask, what limitation can possibly be placed upon the powers of a Government claiming and exercising such rights? And, if none can be, how can the separate Governments of the States maintain those which are reserved to them, and, among others, the sovereign powers by which they ordained and established, not only their separate State Constitutions and Governments, but also the Constitution and Government of the United States? But, if they have no constitutional means of maintaining them against the right claimed by this Government, it necessarily follows that they hold them at its pleasure

and discretion, and that all the powers of the system are in reality concentrated in it. It also follows that the character of the Government has been changed in consequence from a federal republic, as it originally came from the hands of its framers, into a great national consolidated democracy. It has, indeed, at present, all the characteristics of the latter, and not one of the former, although it still retains its outward form.

The result of the whole of these causes combined is — that the North has acquired a decided ascendancy over every department of this Government and, through it, a control over all the powers of the system. A single section governed by the will of the numerical majority has now, in fact, the control of the Government and the entire powers of the system. What was once a constitutional federal republic is now converted, in reality, into one as absolute as that of the Autocrat of Russia, and as despotic in its tendency as any absolute government that ever existed.

As, then, the North has the absolute control over the Government, it is manifest that on all questions between it and the South, where there is a diversity of interests, the interest of the latter will be sacrificed to the former, however oppressive the effects may be; as the South possesses no means by which it can resist through the action of the Government. But, if there was no question of vital importance to the South, in reference to which there was a diversity of views between the two sections, this state of things might be endured without the hazard of destruction to the South. But such is not the fact. There is a question of vital importance to the Southern section, in reference to which the views and feelings of the two sections are as opposite and hostile as they can possibly be.

I refer to the relation between the two races in the Southern section, which constitutes a vital portion of her social organization. Every portion of the North entertains

views and feelings more or less hostile to it. Those most opposed and hostile regard it as a sin, and consider themselves under the most sacred obligation to use every effort to destroy it. Indeed, to the extent that they conceive they have power, they regard themselves as implicated in the sin, and responsible for not suppressing it by the use of all and every means. Those less opposed and hostile regard it as a crime — an offense against humanity, as they call it; and, although not so fanatical, feel themselves bound to use all efforts to effect the same object; while those who are least opposed and hostile regard it as a blot and a stain on the character of what they call the Nation, and feel themselves accordingly bound to give it no countenance or support. On the contrary, the Southern section regards the relation as one which cannot be destroyed without subjecting the two races to the greatest calamity, and the section to poverty, desolation, and wretchedness; and, accordingly, they feel bound, by every consideration of interest and safety, to defend it.

This hostile feeling on the part of the North towards the social organization of the South long lay dormant, but it only required some cause to act on those who felt most intensely that they were responsible for its continuance to call it into action. The increasing power of this Government, and of the control of the Northern section over all its departments, furnished the cause. It was this which made an impression on the minds of many that there was little or no restraint to prevent the Government from doing whatever it might choose to do. This was sufficient of itself to put the most fanatical portion of the North in action, for the purpose of destroying the existing relation between the two races in the South.

The first organized movement towards it commenced in 1835. Then, for the first time, societies were organized, presses established, lecturers sent forth to excite the people

of the North, and incendiary publications scattered over the whole South through the mail. The South was thoroughly aroused. Meetings were held everywhere, and resolutions adopted, calling upon the North to apply a remedy to arrest the threatened evil, and pledging themselves to adopt measures for their own protection if it was not arrested. At the meeting of Congress, petitions poured in from the North, calling upon Congress to abolish slavery in the District of Columbia, and to prohibit what they called the internal slave trade between the States — announcing, at the same time, that their ultimate object was to abolish slavery, not only in the District, but in the States and throughout the Union. At this period the number engaged in the agitation was small and possessed little or no personal influence.

Neither party in Congress had, at that time, any sympathy with them or their cause. The members of each party presented their petitions with great reluctance. Nevertheless, small and contemptible as the party then was, both of the great parties of the North dreaded them. They felt that, though small, they were organized in reference to a subject which had a great and a commanding influence over the Northern mind. Each party, on that account, feared to oppose their petitions, lest the opposite party should take advantage of the one who might do so, by favoring them. The effect was that both united in insisting that the petitions should be received, and that Congress should take jurisdiction over the subject. To justify their course, they took the extraordinary ground that Congress was bound to receive petitions on every subject, however objectionable they might be, and whether they had or had not jurisdiction over the subject. These views prevailed in the House of Representatives, and partially in the Senate; and thus the party succeeded in their first movements, in gaining what they proposed — a position in

Congress, from which agitation could be extended over the whole Union. This was the commencement of the agitation, which has ever since continued, and which, as is now acknowledged, has endangered the Union itself.

As for myself, I believed at that early period if the party who got up the petitions should succeed in getting Congress to take jurisdiction, that agitation would follow, and that it would in the end, if not arrested, destroy the Union. I then so expressed myself in debate, and called upon both parties to take grounds against assuming jurisdiction; but in vain. Had my voice been heeded, and had Congress refused to take jurisdiction, by the united votes of all parties the agitation which followed would have been prevented, and the fanatical zeal that gives impulse to the agitation and which has brought us to our present perilous condition, would have become extinguished, from the want of fuel to feed the flame. *That* was the time for the North to have shown her devotion to the Union; but, unfortunately, both of the great parties of that section were so intent on obtaining or retaining party ascendancy that all other considerations were overlooked or forgotten.

What has since followed is but the natural consequence. With the success of their first movement, this small fanatical party began to acquire strength; and, with that, to become an object of courtship to both the great parties. The necessary consequence was a further increase of power, and a gradual tainting of the opinions of both of the other parties with their doctrines, until the infection has extended over both; and the great mass of the population of the North, who, whatever may be their opinion of the original Abolition party, which still preserves its distinctive organization, hardly ever fail, when it comes to acting, to coöperate in carrying out their measures. With the increase of their influence, they extended the sphere of their action. In a short time after the commencement of their



first movement, they had acquired sufficient influence to induce the legislatures of most of the Northern States to pass acts, which, in effect, abrogated the clause of the Constitution that provides for the delivery up of fugitive slaves. Not long after, petitions followed to abolish slavery in forts, magazines, and dock-yards, and all other places where Congress had exclusive power of legislation. This was followed by petitions and resolutions of legislatures of the Northern States, and popular meetings, to exclude the Southern States from all Territories acquired or to be acquired, and to prevent the admission of any State hereafter into the Union, which, by its constitution, does not prohibit slavery. And Congress is invoked to do all this expressly with the view to the final abolition of slavery in the States. That has been avowed to be the ultimate object from the beginning of the agitation until the present time; and yet the great body of both parties of the North, with the full knowledge of the fact, although disavowing the abolitionists, have coöperated with them in almost all their measures.

Such is a brief history of the agitation, as far as it has yet advanced. Now, I ask, Senators, what is there to prevent its further progress, until it fulfills the ultimate end proposed, unless some decisive measure should be adopted to prevent it? Has any one of the causes, which has added to its increase, from its original small and contemptible beginning until it has attained its present magnitude, diminished in force? Is the original cause of the movement — that slavery is a sin, and ought to be suppressed — weaker now than at the commencement? Or is the Abolition party less numerous or influential, or have they less influence with or control over the two great parties of the North in elections? Or has the South greater means of influencing or controlling the movements of this Government now than it had when the agitation commenced? To all these ques-

tions but one answer can be given: No — no — no. The very reverse is true. Instead of being weaker, all the elements in favor of agitation are stronger now than they were in 1835, when it first commenced, while all the elements of influence on the part of the South are weaker. Unless something decisive is done, I again ask, what is to stop this agitation before the great and final object at which it aims — the abolition of slavery in the States — is consummated? Is it, then, not certain that if something is not done to arrest it, the South will be forced to choose between abolition and secession? Indeed, as events are now moving, it will not require the South to secede in order to dissolve the Union. Agitation will of itself effect it, of which its past history furnishes abundant proof — as I shall next proceed to show.

It is a great mistake to suppose that disunion can be effected by a single blow. The cords which bound these States together in one common Union are far too numerous and powerful for that. Disunion must be the work of time. It is only through a long process, and successively, that the cords can be snapped, until the whole fabric falls asunder. Already the agitation of the slavery question has snapped some of the most important, and has greatly weakened all the others, as I shall proceed to show.

The cords that bind the States together are not only many, but various in character. Some are spiritual or ecclesiastical; some political; others social. Some appertain to the benefit conferred by the Union, and others to the feeling of duty and obligation.

The strongest of those of a spiritual and ecclesiastical nature consisted in the unity of the great religious denominations, all of which originally embraced the whole Union. All these denominations, with the exception, perhaps, of the Catholics, were organized very much upon the principle of our political institutions. Beginning with smaller

meetings, corresponding with the political divisions of the country, their organization terminated in one great central assemblage, corresponding very much with the character of Congress. At these meetings the principal clergymen and lay members of the respective denominations, from all parts of the Union, met to transact business relating to their common concerns. It was not confined to what appertained to the doctrines and discipline of the respective denominations, but extended to plans for disseminating the Bible — establishing missions, distributing tracts — and of establishing presses for the publication of tracts, newspapers, and periodicals, with a view of diffusing religious information — and for the support of their respective doctrines and creeds. All this combined contributed greatly to strengthen the bonds of the Union. The ties which held each denomination together formed a strong cord to hold the whole Union together; but, powerful as they were, they have not been able to resist the explosive effect of slavery agitation.

The first of these cords which snapped under its explosive force was that of the powerful Methodist Episcopal Church. The numerous and strong ties which held it together are all broken and its unity gone. They now form separate churches; and, instead of that feeling of attachment and devotion to the interests of the whole church which was formerly felt, they are now arrayed into two hostile bodies, engaged in litigation about what was formerly their common property.

The next cord that snapped was that of the Baptists — one of the largest and most respectable of the denominations. That of the Presbyterian is not entirely snapped, but some of its strands have given way. That of the Episcopal Church is the only one of the four great Protestant denominations which remains unbroken and entire.

The strongest cord of a political character consists of the many and powerful ties that have held together the two

great parties which have, with some modifications, existed from the beginning of the Government. They both extended to every portion of the Union, and strongly contributed to hold all its parts together. But this powerful cord has fared no better than the spiritual. It resisted for a long time the explosive tendency of the agitation, but has finally snapped under its force — if not entirely, in a great measure. Nor is there one of the remaining cords which has not been greatly weakened. To this extent the Union has already been destroyed by agitation, in the only way it can be, by sundering and weakening the cords which bind it together.

If the agitation goes on, the same force, acting with increased intensity, as has been shown, will finally snap every cord, when nothing will be left to hold the States together except force. But, surely, that can, with no propriety of language, be called a Union, when the only means by which the weaker is held connected with the stronger portion is *force*. It may, indeed, keep them connected; but the connection will partake much more of the character of subjugation on the part of the weaker to the stronger than the union of free, independent, and sovereign States, in one confederation, as they stood in the early stages of the Government, and which only is worthy of the sacred name of Union.

Having now, Senators, explained what it is that endangers the Union, and traced it to its cause and explained its nature and character, the question again recurs — How can the Union be saved? To this I answer, there is but one way by which it can be — and that is — by adopting such measures as will satisfy the States belonging to the Southern section that they can remain in the Union consistently with their honor and their safety. There is, again, only one way by which this can be effected, and that is — by removing the causes by which this belief has been produced. Do

*this*, and discontent will cease — harmony and kind feelings between the sections be restored — and every apprehension of danger to the Union removed. The question, then, is — How can this be done? But, before I undertake to answer this question, I propose to show by what the Union cannot be saved.

It cannot, then, be saved by eulogies on the Union, however splendid or numerous. The cry of “Union, Union — the glorious Union!” can no more prevent disunion than the cry of “Health, health — glorious health!” on the part of the physician can save a patient lying dangerously ill. So long as the Union, instead of being regarded as a protector, is regarded in the opposite character by not much less than a majority of the States, it will be in vain to attempt to conciliate them by pronouncing eulogies on it.

Besides, this cry of Union comes commonly from those whom we cannot believe to be sincere. It usually comes from our assailants. But we cannot believe them to be sincere; for, if they loved the Union, they would necessarily be devoted to the Constitution. It made the Union, — and to destroy the Constitution would be to destroy the Union. But the only reliable and certain evidence of devotion to the Constitution is to abstain, on the one hand, from violating it, and to repel, on the other, all attempts to violate it. It is only by faithfully performing these high duties that the Constitution can be preserved and, with it, the Union.

But how stands the profession of devotion to the Union by our assailants, when brought to this test? Have they abstained from violating the Constitution? Let the many acts passed by the Northern States to set aside and annul the clause of the Constitution providing for the delivery up of fugitive slaves answer. I cite this, not that it is the only instance (for there are many others), but because the violation in this particular is too notorious and palpable to be

denied. Again: Have they stood forth faithfully to repel violations of the Constitution? Let their course in reference to the agitation of the slavery question, which was commenced and has been carried on for fifteen years, avowedly for the purpose of abolishing slavery in the States, — an object all acknowledged to be unconstitutional, — answer. Let them show a single instance during this long period, in which they have denounced the agitators or their attempts to effect what is admitted to be unconstitutional, or a single measure which they have brought forward for that purpose. How can we, with all these facts before us, believe that they are sincere in their profession of devotion to the Union, or avoid believing their profession is but intended to increase the vigor of their assaults and to weaken the force of our resistance?

Nor can we regard the profession of devotion to the Union on the part of those who are not our assailants as sincere, when they pronounce eulogies upon the Union, evidently with the intent of charging us with disunion, without uttering one word of denunciation against our assailants. If friends of the Union, their course should be to unite with us in repelling these assaults, and denouncing the authors as enemies of the Union. Why they avoid this and pursue the course they do it is for them to explain.

Nor can the Union be saved by invoking the name of the illustrious Southerner whose mortal remains repose on the western bank of the Potomac. He was one of us — a slaveholder and a planter. We have studied his history, and find nothing in it to justify submission to wrong. On the contrary, his great fame rests on the solid foundation that, while he was careful to avoid doing wrong to others, he was prompt and decided in repelling wrong. I trust that, in this respect, we profited by his example.

Nor can we find anything in his history to deter us from seceding from the Union, should it fail to fulfill the

objects for which it was instituted, by being permanently and hopelessly converted into the means of oppressing instead of protecting us. On the contrary, we find much in his example to encourage us, should we be forced to the extremity of deciding between submission and disunion.

There existed then, as well as now, a union — that between the parent country and her then colonies. It was a union that had much to endear it to the people of the colonies. Under its protecting and superintending care the colonies were planted and grew up and prospered, through a long course of years, until they became populous and wealthy. Its benefits were not limited to them. Their extensive agricultural and other productions gave birth to a flourishing commerce, which richly rewarded the parent country for the trouble and expense of establishing and protecting them. Washington was born and grew up to manhood under that union. He acquired his early distinction in its service, and there is every reason to believe that he was devotedly attached to it. But his devotion was a rational one. He was attached to it, not as an end, but as a means to an end. When it failed to fulfill its end, and, instead of affording protection, was converted into the means of oppressing the colonies, he did not hesitate to draw his sword and head the great movement by which that union was forever severed, and the independence of these States established. This was the great and crowning glory of his life, which has spread his fame over the whole globe, and will transmit it to the latest posterity.

Nor can the plan proposed by the distinguished Senator from Kentucky, nor that of the Administration, save the Union. I shall pass by, without remark, the plan proposed by the Senator, and proceed directly to the consideration of that of the Administration. I, however, assure the distinguished and able Senator, that, in taking this course, no disrespect whatever is intended to him or his plan. I have

adopted it because so many Senators of distinguished abilities, who were present when he delivered his speech and explained his plan, and who were fully capable to do justice to the side they support, have replied to him.

The plan of the Administration cannot save the Union, because it can have no effect whatever towards satisfying the States composing the Southern section of the Union. It is, in fact, but a modification of the Wilmot Proviso. It proposes to effect the same object — to exclude the South from all territory acquired by the Mexican treaty. It is well known that the South is united against the Wilmot Proviso, and has committed itself by solemn resolution to resist, should it be adopted. Its opposition is *not to the name*, but that which it *proposes to effect*. That, the Southern States hold to be unconstitutional, unjust, inconsistent with their equality as members of the common Union, and calculated to destroy irretrievably the equilibrium between the two sections. These objections equally apply to what, for brevity, I will call the Executive Proviso. There is no difference between it and the Wilmot, except in the mode of effecting the object; and in that respect, I must say, that the latter is much the least objectionable. It goes to its object openly, boldly, and distinctly. It claims for Congress unlimited power over the Territories, and proposes to exert it over the Territories acquired from Mexico by a positive prohibition of slavery. Not so the Executive Proviso. It takes an indirect course, and, in order to elude the Wilmot Proviso and thereby avoid encountering the united and determined resistance of the South, denies, by implication, the authority of Congress to legislate for the Territories, and claims the right as belonging exclusively to the inhabitants of the Territories. But to effect the object of excluding the South, it takes care, in the mean time, to let in emigrants freely from the Northern States and all other quarters, except from the South, which it



takes special care to exclude by holding up to them the danger of having their slaves liberated by the Mexican laws. The necessary consequence is to exclude the South from the Territory, just as effectually as would the Wilmot Proviso. The only difference in this respect is that what one proposes to effect directly and openly the other proposes to effect indirectly and covertly.

But the Executive Proviso is more objectionable than the Wilmot, in another and more important particular. The latter, to effect its object, inflicts a dangerous wound upon the Constitution by depriving the Southern States as joint partners and owners of the Territories, of their rights in them; but it inflicts no greater wound than is necessary to effect its object. The former, on the contrary, while it inflicts the same wound, inflicts others equally great, and, if possible, greater, as I shall next proceed to explain.

In claiming the right for the inhabitants, instead of Congress, to legislate for the Territories, the Executive Proviso assumes that the sovereignty over the Territories is vested in the former: or, to express it in the language used in a resolution offered by one of the Senators from Texas (General Houston, now absent), they have "the same inherent right of self-government as the people in the States." The assumption is utterly unfounded, unconstitutional, without example, and contrary to the entire practice of the Government from its commencement to the present time, as I shall proceed to show.

The recent movement of individuals in California to form a constitution and a State Government, and to appoint Senators and Representatives, is the first fruit of this monstrous assumption. If the individuals who made this movement had gone into California as adventurers, and if, as such, they had conquered the territory and established their independence, the sovereignty of the country would have been vested in them, as a separate and independent

community. In that case, they would have had the right to form a constitution, and to establish a government for themselves; and if, afterwards, they thought proper to apply to Congress for admission into the Union as a sovereign and independent State, all this would have been regular, and according to established principles. But such was not the case. It was the United States who conquered California and finally acquired it by treaty. The sovereignty, of course, is vested in them, and not in the individuals who have attempted to form a constitution and a State without their consent. All this is clear, beyond controversy, unless it can be shown that they have since lost or been divested of their sovereignty.

Nor is it less clear that the power of legislating over the acquired territory is vested in Congress, and not, as is assumed, in the inhabitants of the Territories. None can deny that the Government of the United States has the power to acquire territories, either by war or treaty; but, if the power to acquire exists, it belongs to Congress to carry it into execution. On this point there can be no doubt, for the Constitution expressly provides that Congress shall have power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers" (those vested in Congress) "and all other powers vested by this Constitution in the *Government* of the United States, or in *any department or officer* thereof." It matters not, then, where the power is vested; for, if vested at all in the Government of the United States or any of its departments or officers, the power of carrying it into execution is clearly vested in Congress. But this important provision, while it gives to Congress the power of legislating over Territories, imposes important limitations on its exercise, by restricting Congress to passing laws necessary and proper for carrying the power into execution. The prohibition extends not only to all laws not suitable or appro-

priate to the object of the power, but also to all that are unjust, unequal, or unfair, — for all such laws would be unnecessary and improper, and, therefore, unconstitutional.

Having now established, beyond controversy, that the sovereignty over the Territories is vested in the United States, — that is, in the several States composing the Union, — and that the power of legislating over them is expressly vested in Congress, it follows that the individuals in California who have undertaken to form a constitution and a State, and to exercise the power of legislating without the consent of Congress, have usurped the sovereignty of the State and the authority of Congress, and have acted in open defiance of both. In other words, what they have done is revolutionary and rebellious in its character, anarchical in its tendency, and calculated to lead to the most dangerous consequences. Had they acted from premeditation and design, it would have been, in fact, actual rebellion; but such is not the case. The blame lies much less upon them than upon those who have induced them to take a course so unconstitutional and dangerous. They have been led into it by language held here and the course pursued by the Executive branch of the Government.

I have not seen the answer of the Executive to the calls made by the two Houses of Congress for information as to the course which it took, or the part which it acted, in reference to what was done in California. I understand the answers have not yet been printed. But there is enough known to justify the assertion that those who profess to represent and act under the authority of the Executive have advised, aided, and encouraged the movement, which terminated in forming what they call a constitution and a State. General Riley, who professed to act as civil Governor, called the convention — determined on the number and distribution of the delegates — appointed the time and place of its meeting — was present during the session —

and gave its proceedings his approbation and sanction. If he acted without authority, he ought to have been tried, or, at least, reprimanded, and his course disavowed. Neither having been done, the presumption is that his course has been approved. This, of itself, is sufficient to identify the Executive with his acts, and to make it responsible for them. I touch not the question whether General Riley was appointed or received the instructions under which he professed to act from the present Executive or its predecessor. If from the former, it would implicate the preceding as well as the present Administration. If not, the responsibility rests exclusively on the present.

It is manifest from this statement that the Executive Department has undertaken to perform acts preparatory to the meeting of the individuals to form their so-called constitution and government, which appertain exclusively to Congress. Indeed, they are identical, in many respects, with the provisions adopted by Congress when it gives permission to a Territory to form a constitution and government in order to be admitted as a State into the Union.

Having now shown that the assumption upon which the Executive and the individuals in California acted throughout this whole affair is unfounded, unconstitutional, and dangerous, it remains to make a few remarks, in order to show that what has been done is contrary to the entire practice of the Government, from the commencement to the present time.

From its commencement to the time that Michigan was admitted the practice was uniform. Territorial Governments were first organized by Congress. The Government of the United States appointed the governors, judges, secretaries, marshals, and other officers; and the inhabitants of the Territory were represented by legislative bodies, whose acts were subject to the revision of Congress. This state of things continued until the Government of a Territory

applied to Congress to permit its inhabitants to form a constitution and government, preparatory to admission into the Union. The act preliminary to giving permission was to ascertain whether the inhabitants were sufficiently numerous to authorize them to be formed into a State. This was done by taking a census. That being done and the number proving sufficient, permission was granted. The act granting it fixed all the preliminaries — the time and place of holding the convention, the qualification of the voters, establishment of its boundaries, and all other measures necessary to be settled previous to admission. The act giving permission necessarily withdraws the sovereignty of the United States, and leaves the inhabitants of the incipient State as free to form their constitution and government as were the original States of the Union after they had declared their independence. At this stage the inhabitants of the Territory became, for the first time, a people, in legal and constitutional language. Prior to this, they were, by the old acts of Congress, called inhabitants, and not people. All this is perfectly consistent with the sovereignty of the United States, with the powers of Congress, and with the right of a people to self-government.

Michigan was the first case in which there was any departure from the uniform rule of acting. Hers was a very slight departure from the established usage. The Ordinance of 1787 secured to her the right of becoming a State when she should have sixty thousand inhabitants. Owing to some neglect, Congress delayed taking the census. In the mean time her population increased until it clearly exceeded more than twice the number which entitled her to admission. At this stage she formed a constitution and government, without a census being taken by the United States, and Congress waived the omission, as there was no doubt she had more than a sufficient number to entitle her to admission. She was not admitted at the first session she applied, owing

to some difficulty respecting the boundary between her and Ohio. The great irregularity as to her admission took place at the next session — but on a point which can have no possible connection with the case of California.

Their regularities in all other cases that have since occurred are of similar nature. In all, there existed Territorial Governments established by Congress, with officers appointed by the United States. In all, the Territorial Government took the lead in calling conventions and fixing the preliminaries preparatory to the formation of a constitution and admission into the Union. They all recognized the sovereignty of the United States and the authority of Congress over the Territories; and wherever there was any departure from established usage, it was done on the presumed consent of Congress, and not in defiance of its authority or the sovereignty of the United States over the Territories. In this respect California stands alone, without usage or a single example to cover her case.

It belongs now, Senators, to you to decide what part you will act in reference to this unprecedented transaction. The Executive has laid the paper purporting to be the constitution of California before you, and asks you to admit her into the Union as a State; and the question is, Will you or will you not admit her? It is a grave question, and there rests upon you a heavy responsibility. Much, very much, will depend upon your decision. If you admit her, you endorse and give your sanction to all that has been done. Are you prepared to do so? Are you prepared to surrender your power of legislation for the Territories — a power expressly vested in Congress by the Constitution, as has been fully established? Can you, consistently with your oath to support the Constitution, surrender the power? Are you prepared to admit that the inhabitants of the Territories possess the sovereignty over them, and that any number, more or less, may claim any extent of territory

they please; may form a constitution and government, and erect it into a State, without asking your permission? Are you prepared to surrender the sovereignty of the United States over whatever territory may be hereafter acquired to the first adventurers who may rush into it? Are you prepared to surrender virtually to the Executive Department all the powers which you have heretofore exercised over the Territories? If not, how can you, consistently with your duty and your oaths to support the Constitution, give your assent to the admission of California as a State, under a pretended constitution and government? Again, can you believe that the project of a constitution which they have adopted has the least validity? Can you believe that there is such a State in reality as the State of California? No; there is no such State. It has no legal or constitutional existence. It has no validity, and can have none, without your sanction. How, then, can you admit it as a *State*, when, according to the provision of the Constitution, your power is limited to admitting new *States*? To be admitted, it must be a State — and an existing State, independent of your sanction, before you can admit it. When you give your permission to the inhabitants of a Territory to form a constitution and a State, the constitution and State they form derive their authority from the people, and not from you. The State, before it is admitted, is actually a State, and does not become so by the *act of admission*, as would be the case with California, should you admit her contrary to the constitutional provision and established usage heretofore.

The Senators on the other side of the Chamber must permit me to make a few remarks in this connection particularly applicable to them — with the exception of a few Senators from the South, sitting on the other side of the Chamber. When the Oregon question was before this body, not two years since, you took (if I mistake not) universally the ground that Congress had the sole and absolute power

of legislating for the Territories. How, then, can you now, after the short interval which has elapsed, abandon the ground which you took, and thereby virtually admit that the power of legislating, instead of being in Congress, is in the inhabitants of the Territories? How can you justify and sanction by your votes the acts of the Executive, which are in direct derogation of what you then contended for? But, to approach still nearer to the present time, how can you, after condemning, little more than a year since, the grounds taken by the party which you defeated at the last election, wheel round and support by your votes the grounds which, as explained recently on this floor by the candidate of the party in the last election, are identical with those on which the Executive has acted in reference to California? What are we to understand by all this? Must we conclude that there is no sincerity, no faith in the acts and declarations of public men, and that all is mere acting or hollow profession? Or are we to conclude that the exclusion of the South from the territory acquired from Mexico is an object of so paramount a character in your estimation, that right, justice, Constitution, and consistency must all yield when they stand in the way of our exclusion?

But, it may be asked, what is to be done with California? Should she not be admitted? I answer, remand her back to the Territorial condition, as was done in the case of Tennessee, in the early stage of the Government. Congress, in her case, had established a Territorial Government in the usual form, with a governor, judge, and other officers appointed by the United States. She was entitled, under the deed of cession, to be admitted into the Union as a State, as soon as she had sixty thousand inhabitants. The Territorial Government, believing it had that number, took a census, by which it appeared it exceeded it. She then formed a constitution, and applied for admission. Congress refused to admit her, on the ground that the census



should be taken by the United States, and that Congress had not determined whether the Territory should be formed into one or two States, as it was authorized to do under the cession. She returned quietly to her territorial condition. An act was passed to take a census by the United States, containing a provision that the Territory should form one State. All afterwards was regularly conducted, and the Territory admitted as a State in due form. The irregularities in the case of California are immeasurably greater, and offer much stronger reasons for pursuing the same course. But, it may be said, California may not submit. That is not probable; but if she should not, when she refuses, it will then be time for us to decide what is to be done.

Having now shown what cannot save the Union, I return to the question with which I commenced, How can the Union be saved? There is but one way by which it can with any certainty; and that is, by a full and final settlement, on the principles of justice, of all the questions at issue between the two sections. The South asks for justice, simple justice, and less she ought not to take. She has no compromise to offer but the Constitution; and no concession or surrender to make. She has already surrendered so much that she has little left to surrender. Such a settlement would go to the root of the evil, and remove all cause of discontent; by satisfying the South, she could remain honorably and safely in the Union, and thereby restore the harmony and fraternal feelings between the sections, which existed anterior to the Missouri agitation. Nothing else can, with any certainty, finally and forever settle the questions at issue, terminate agitation, and save the Union.

But can this be done? Yes, easily; not by the weaker party, for it can of itself do nothing, — not even protect itself, — but by the stronger. The North has only to will it to accomplish it — to do justice by conceding to the

South an equal right in the acquired territory, and to do her duty by causing the stipulations relative to fugitive slaves to be faithfully fulfilled — to cease the agitation of the slave question, and to provide for the insertion of a provision in the Constitution, by an amendment, which will restore to the South, in substance, the power she possessed of protecting herself, before the equilibrium between the sections was destroyed by the action of this Government. There will be no difficulty in devising such a provision — one that will protect the South, and which, at the same time, will improve and strengthen the Government, instead of impairing and weakening it.

But will the North agree to this? It is for her to answer the question. But, I will say, she cannot refuse, if she has half the love of the Union which she professes to have, or without justly exposing herself to the charge that her love of power and aggrandizement is far greater than her love of the Union. At all events, the responsibility of saving the Union rests on the North, and not on the South. The South cannot save it by any act of hers, and the North may save it without any sacrifice whatever, unless to do justice and to perform her duties under the Constitution should be regarded by her as a sacrifice.

It is time, Senators, that there should be an open and manly avowal on all sides as to what is intended to be done. If the question is not now settled, it is uncertain whether it ever can hereafter be; and we, as the representatives of the States of this Union, regarded as governments, should come to a distinct understanding as to our respective views, in order to ascertain whether the great questions at issue can be settled or not. If you, who represent the stronger portion, cannot agree to settle them on the broad principle of justice and duty, say so; and let the States we both represent agree to separate and part in peace. If you are unwilling we should part in peace, tell us so, and we shall

know what to do when you reduce the question to submission or resistance. If you remain silent, you will compel us to infer by your acts what you intend. In that case, California will become the test question. If you admit her, under all the difficulties that oppose her admission, you compel us to infer that you intend to exclude us from the whole of the acquired territories, with the intention of destroying irretrievably the equilibrium between the two sections. We would be blind not to perceive in that case that your real objects are power and aggrandizement, and infatuated not to act accordingly.

I have now, Senators, done my duty in expressing my opinions fully, freely, and candidly, on this solemn occasion. In doing so, I have been governed by the motives which have governed me in all the stages of the agitation of the slavery question since its commencement. I have exerted myself, during the whole period, to arrest it, with the intention of saving the Union, if it could be done; and, if it could not, to save the section where it has pleased Providence to cast my lot, and which I sincerely believe has justice and the Constitution on its side. Having faithfully done my duty to the best of my ability, both to the Union and my section, throughout this agitation, I shall have the consolation, let what will come, that I am free from all responsibility.

5. THE SPEECH OF BENJAMIN R. CURTIS<sup>1</sup>

*Before the Senate of the United States, in defense of President Andrew Johnson, accused of High Treason. Delivered May 9, 1868*

On February 22, 1868, the House of Representatives recommended that Andrew Johnson, President of the United States, be impeached "of high crimes and misdemeanors in office," and, three days later, Thaddeus Stevens and John A. Bingham appeared before the Senate to announce the vote of the House and to give notice that in due time that body would present before the Senate "the particular articles of impeachment against the President and make good the same."

The principal charge brought against President Johnson was to the effect that he had violated the Constitution and had overstepped the Tenure-of-Office Act in removing Edwin M. Stanton from his position as Secretary of War, to which he had been appointed by President Lincoln. It was also contended that the character of many of President Johnson's public speeches constituted a "high misdemeanor in office."

The House of Representatives appointed as the managers of the prosecution John A. Bingham, George S. Boutwell, James S. Wilson, Benjamin F. Butler, Thomas Williams, Thaddeus Stevens, and John A. Logan. The President selected as his counsel for the defense Henry Stanbery, Benjamin R. Curtis, Thomas A. R. Nelson, William M. Evarts, and William S. Groesbeck.

The case was presented for trial March 5, before the Senate "sitting on the trial of impeachment," the Honorable Salmon P. Chase, Chief Justice of the Supreme Court, acting as presiding officer. The trial proper began March 30.

The speech of Mr. Curtis, which follows, was delivered on April 9, and opened the President's defense. Regarding Mr. Curtis, James G. Blaine, in *Twenty Years of Congress*, writes:

Benjamin R. Curtis, when he appeared in the Impeachment case, was in the fullness of his powers, in the fifty-ninth year of his age. At forty-one he had been appointed to the Supreme Bench of the United States at the earnest request and warm recommendation of Mr. Webster, then Secretary of State. Mr. Webster is reported to have said that he had

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<sup>1</sup> From the *Congressional Globe*.

placed the people of Massachusetts under lasting obligation to him by inducing Governor Lincoln, in 1830, to appoint Lemuel Shaw Chief Justice of the Supreme Court of the State, a position which he honored and adorned for thirty years. Mr. Webster thought he was doing an equal service to the people of the entire Union when he induced the President to call Mr. Curtis to the Supreme Bench. But judicial life had not proved altogether agreeable to Judge Curtis, and, after a remarkable and brilliant career of six years, he resigned, in October, 1857, and returned to the practice of the law — his learning increased, his mind enriched and broadened by the grave national questions engaging the attention of the court during the period of his service. Thenceforward during his life no man at the bar of the United States held higher rank. He was entirely devoted to his profession. He had taken no interest in party strife, and, with the exception of serving two sessions in the Massachusetts Legislature, he had never held a political office. In arguing a case his style was peculiarly felicitous — simple, direct, clear. In the full maturity of his powers and with all the earnestness of his nature he engaged in the President's defense; and he brought to it a wealth of learning, a dignity of character, an impressiveness of speech, which attracted the admiration and respect of all who had the good fortune to hear his great argument.

On May 11 the case was completed, and the Senate proceeded to vote on the eleventh and last article of the impeachment. Fifty-four votes were cast, and a two-thirds majority, thirty-six, was necessary for conviction. Thirty-five senators voted "guilty," and nineteen "not guilty." The Senate then adjourned to May 26, when it voted upon the second and third articles respectively, with precisely the same result as upon the first article considered. As it appeared hopeless to bring about a change in the ballot, each Senator holding to his verdict, — although it has been charged that great influence was brought to bear in certain cases to effect an alteration in the vote, — the remaining articles were abandoned, and the Senate adjourned, after what ranks as one of the most important trials in the history of our National Government.

MR. CHIEF JUSTICE, I am here to speak to the Senate of the United States sitting in its judicial capacity as a court of impeachment, presided over by the Chief Justice of the United States, for the trial of the President of the United States. This statement sufficiently characterizes what I have to say. Here party spirit, political schemes, foregone conclusions, outrageous biases can have no fit operation.

The Constitution requires that here should be a "trial," and as in that trial the oath which each one of you has taken is to administer "impartial justice according to the Constitution and the laws," the only appeal which I can make in behalf of the President is an appeal to the conscience and the reason of each judge who sits before me. Upon the law and the facts, upon the judicial merits of the case, upon the duties incumbent on that high officer by virtue of his office, and his honest endeavor to discharge those duties, the President rests his defense. And I pray each one of you to listen to me with that patience which belongs to a judge for his own sake, which I cannot expect to command by any efforts of mine, while I open to you what that defense is.

The honorable Managers, through their associate who has addressed you [Mr. Butler], has informed you that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Upon those subjects I shall have something hereafter to say. The honorable Manager did not tell you, in terms at least, that here are no articles before you, because a statement of that fact would be in substance to say that here are no honorable Managers before you, inasmuch as the only authority with which the honorable Managers are clothed by the House of Representatives is an authority to present here at your bar certain articles, and, within their limits, conduct this prosecution; and, therefore, I shall make no apology, Senators, for asking your close attention to these articles, one after the other, in manner and form as they are here presented, to ascertain, in the first place, what are the substantial allegations in each of them, what is the legal operation and effect of those allegations, and what proof is necessary to be adduced in order to sustain them; and I shall begin with the first, not merely because the House of Representatives, in arranging these articles, have placed

that first in order, but because the subject-matter of that article is of such a character that it forms the foundation of the first eight articles in the series, and enters materially into two of the remaining three.

What, then, is the substance of this first article? What, as the lawyers say, are the *gravamina* contained in it? There is a great deal of verbiage — I do not mean by that unnecessary verbiage — in the description of the substantive matters set down in this article. Stripped of that verbiage, it amounts exactly to these things: first, that the order set out in the article for the removal of Mr. Stanton, if executed, would be a violation of the Tenure-of-Office Act; second, that it was a violation of the Tenure-of-Office Act; third, that it was an intentional violation of the Tenure-of-Office Act; fourth, that it was a violation of the Constitution of the United States; and fifth, was by the President intended to be so. Or, to draw all this into one sentence which yet may be intelligible and clear enough, I suppose the substance of this first article is that the order for the removal of Mr. Stanton was and was intended to be a violation of the Tenure-of-Office Act, and was intended to be a violation of the Constitution of the United States. These are the allegations which it is necessary for the honorable Managers to make out in proof to support that article.

Now, there is a question involved here which enters deeply, as I have already intimated, into the first eight articles in this series, and materially touches two of the others; and to that question I desire in the first place to invite the attention of the court. That question is, whether Mr. Stanton's case comes under the Tenure-of-Office Act. If it does not, if the true construction and effect of the Tenure-of-Office Act when applied to the facts of his case excludes it, then it will be found by honorable Senators, when they come to examine this and the other articles, that

a mortal wound has been inflicted upon them by that decision. I must, therefore, ask your attention to the construction and application of the first section of the Tenure-of-Office Act. It is, as Senators know, but dry work; it requires close, careful attention and reflection; no doubt it will receive them. Allow me, in the first place, to read that section:

That every person holding any official office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided.

Then comes what is "otherwise provided":

*Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

Here is a section, then, the body of which applies to all civil officers, as well to those then in office as to those who should thereafter be appointed. The body of that section contains a declaration that every such officer "is," that is, if he is now in office, "and shall be," that is, if he shall hereafter be appointed to office, entitled to hold until a successor is appointed and qualified in his place. That is the body of the section. But out of this body of the section it is explicitly declared that there is to be excepted a particular class of officers — "except as herein otherwise provided." There is to be excepted out of this general description of all civil officers a particular class of officers as to whom something is "otherwise provided"; that is, a different rule is to be announced for them.



The Senate will perceive that in the body of the section all officers, as well those then holding office as those thereafter to be appointed, are included. The language is:

Every person holding any civil office to which he has been appointed, . . . and every person who shall hereafter be appointed, . . . is and shall be entitled, etc.

It affects the present; it sweeps over all who are in office and come within the body of the section; it includes by its terms as well all those now in office as those who may be hereafter appointed. But when you come to the proviso the first noticeable thing is that this language is changed; it is not that "every Secretary who now is, and hereafter may be, in office shall be entitled to hold that office" by a certain rule which is here prescribed; but the proviso, while it fixes a rule for the future only, makes no declaration of the present right of one of this class of officers, and the question whether any particular Secretary comes within that rule depends on another question, whether his case comes within the description contained in the proviso. There is no language which expressly brings him within the proviso; there is no express declaration, as in the body of the section, that "he is, and hereafter shall be, entitled" merely because he holds the office of Secretary at the time of the passage of the law. There is nothing to bring him within the proviso, I repeat, unless the description which the proviso contains applies to and includes his case. Now, let us see if it does.

That the Secretaries of State, etc., shall hold their offices respectively for and during the term of the President by whom they may have been appointed.

The first inquiry which arises on this language is as to the meaning of the words "for and during the term of the President." Mr. Stanton, as appears by the commission which has been put into the case by the honorable Managers, was appointed in January, 1862, during the first

term of President Lincoln. Are these words, "during the term of the President," applicable to Mr. Stanton's case? That depends upon whether an expounder of this law judicially, who finds set down in it as a part of the descriptive words "during the term of the President," has any right to add, "and any other term for which he may afterward be elected." By what authority short of legislative power can those words be put into the statute so that "during the term of the President" shall be held to mean "and any other term or terms for which the President may be elected"? I respectfully submit no such judicial interpretation can be put on the words.

Then, if you please, take the next step. "During the term of the President by whom he was appointed." At the time when this order was issued for the removal of Mr. Stanton, was he holding "during the term of the President by whom he was appointed"? The honorable Managers say yes, because, as they say, Mr. Johnson is merely serving out the residue of Mr. Lincoln's term. But is that so under the provisions of the Constitution of the United States? I pray you to allow me to read two clauses which are applicable to this question. The first is the first section of the second article:

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected, as follows.

There is a declaration that the President and the Vice-President is each respectively to hold his office for the term of four years; but that does not stand alone; here is its qualification:

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President.

So that, although the President, like the Vice-President, is elected for a term of four years, and each is elected for the same term, the President is not to hold his office absolutely during four years. The limit of four years is not an absolute limit. Death is a limit. A "conditional limitation," as the lawyers call it, is imposed on his tenure of office. And when, according to this second passage which I have read, the President dies, his term of four years for which he was elected, and during which he was to hold, provided he should so long live, terminates, and the office devolves on the Vice-President. For what period of time? For the remainder of the term for which the Vice-President was elected. And there is no more propriety, under these provisions of the Constitution of the United States, in calling the time during which Mr. Johnson holds the office of President after it was devolved upon him a part of Mr. Lincoln's term than there would be propriety in saying that one sovereign who succeeded to another sovereign by death holds a part of his predecessor's term. The term assigned to Mr. Lincoln by the Constitution was conditionally assigned to him. It was to last four years if not sooner ended; but if sooner ended by his death, then the office was devolved on the Vice-President, and the term of the Vice-President to hold the office then began.

I submit, then, that upon this language of the act it is apparent that Mr. Stanton's case cannot be considered as within it. This law, however, as Senators very well know, had a purpose; there was a practical object in the view of Congress; and however clear it might seem that the language of the law when applied to Mr. Stanton's case would exclude that case, however clear that might seem on the mere words of the law, if the purpose of the law could be discerned, and that purpose plainly required a different interpretation, that different interpretation should be given. But, on the other hand, if the purpose in view was one

requiring that interpretation to which I have been drawing your attention, then it greatly strengthens the argument; because, not only the language of the act itself, but the practical object which the legislature had in view in using that language demands that interpretation.

Now, there can be no dispute concerning what that purpose was, as I suppose. Here is a peculiar class of officers singled out from all others and brought within this provision. Why is this? It is because the Constitution has provided that these principal officers in the several Executive Departments may be called upon by the President for advice "respecting" — for that is the language of the Constitution — "their several duties" — not, as I read the Constitution, that he may call upon the Secretary of War for advice concerning questions arising in the Department of War. He may call upon him for advice concerning questions which are a part of the duty of the President, as well as questions which belong only to the Department of War. Allow me to read that clause of the Constitution, and see if this be not its true interpretation. The language of the Constitution is, that —

He [the President] may require the opinion in writing of the principal officer in each of the Executive Departments upon any subject relating to the duties of their respective offices.

As I read it, relating to the duties of the offices of these principal officers, or relating to the duties of the President himself. At all events, such was the practical interpretation put upon the Constitution from the beginning of the Government; and every gentleman who listens to me who is familiar, as you all are, with the political history of the country, knows that from an early period of the Administration of General Washington his Secretaries were called upon for advice concerning matters not within their respective Departments, and so the practice has continued

from that time to this. This is one thing which distinguishes this class of officers from any other embraced within the body of the law.

But there is another. The Constitution undoubtedly contemplated that there should be Executive Departments created, the heads of which were to assist the President in the administration of the laws as well as by their advice. They were to be the hands and the voice of the President; and accordingly that has been so practiced from the beginning, and the legislation of Congress has been framed on this assumption in the organization of the Departments, and emphatically in the act which constituted the Department of War. That provides, as Senators well remember, in so many words, that the Secretary of War is to discharge such duties of a general description there given as shall be assigned to him by the President, and that he is to perform them under the President's instructions and directions.

Let me repeat, that the Secretary of War and the other Secretaries, the Postmaster-General and the Attorney-General, are deemed to be the assistants of the President in the performance of his great duty to take care that the laws are faithfully executed; that they speak for and act for him. Now, do not these two views furnish the reasons why this class of officers was excepted out of the law? They were to be the advisers of the President; they were to be the immediate confidential assistants of the President, for whom he was to be responsible, but in whom he was expected to repose a great amount of trust and confidence; and therefore it was that this act has connected the tenure of office of these Secretaries to which it applies with the President by whom they were appointed. It says, in the description which the act gives of the future tenure of office of Secretaries, that a controlling regard is to be had to the fact that the Secretary whose tenure is to be regulated was appointed

by some particular President; and during the term of that President he shall continue to hold his office; but as for Secretaries who are in office, not appointed by the President, we have nothing to say; we leave them as they heretofore have been. I submit to Senators that this is the natural and, having regard to the character of these officers, the necessary conclusion, that the tenure of the office of a Secretary here described is a tenure during the term of service of the President by whom he was appointed; that it was not the intention of Congress to compel a President of the United States to continue in office a Secretary not appointed by himself.

We have, however, fortunately, not only the means of interpreting this law which I have alluded to, namely, the language of the act, the evident character and purpose of the act, but we have decisive evidence of what was intended and understood to be the meaning and effect of this law in each branch of Congress at the time when it was passed. In order to make this more apparent and its just weight more evident, allow me to state what is very familiar, no doubt, to Senators, but which I wish to recall to their minds, the history of this proviso, this exception.

The bill, as Senators will recollect, originally excluded these officers altogether. It made no attempt, indeed it rejected all attempts, to prescribe a tenure of office for them, as inappropriate to the necessities of the Government. So the bill went to the House of Representatives. It was there amended by putting the Secretaries on the same footing as all other civil officers appointed with the advice and consent of the Senate, and, thus amended, came back to this body. This body disagreed to the amendment. Thereupon a committee of conference was appointed, and that committee, on the part of the House, had for its chairman Hon. Mr. Schenck, of Ohio, and on the part of this body Hon. Mr. Williams, of Oregon, and Hon. Mr.

Sherman, of Ohio. The committee of conference came to an agreement to alter the bill by striking these Secretaries out of the body of the bill and inserting them in the proviso containing the matter now under consideration. Of course, when this report was made to the House of Representatives and to this body it was incumbent on the committee charged with looking after its intentions and estimates of the public necessities in reference to that conference — it was expected that they would explain what had been agreed to, with a view that the body itself, thus understanding what had been agreed to be done, could proceed to act intelligently on the matter.

Now, I wish to read to the Senate the explanation given by Hon. Mr. Schenck, the chairman of this conference on the part of the House, when he made his report to the House concerning this proviso. After the reading of the report, Mr. Schenck said:

I propose to demand the previous question upon the question of agreeing to the report of the committee of conference. But before doing so, I will explain to the House the condition of the bill and the decision of the conference committee upon it. It will be remembered that by the bill as it passed the Senate it was provided that the concurrence of the Senate should be required in all removals from office, except in the case of the heads of Departments. The House amended the bill of the Senate so as to extend this requirement to the heads of Departments as well as to other officers.

The committee of conference have agreed that the Senate shall accept the amendment of the House. But, inasmuch as this would compel the President to keep around him heads of Departments until the end of his term, who would hold over to another term, a compromise was made by which a further amendment is added to this portion of the bill, so that the term of office of the heads of Departments shall expire with the term of the President who appointed them, allowing those heads of Departments one month longer, in which, in case of death or otherwise, other heads of Departments can be named. This is the whole effect of the proposition reported by the committee of conference; it is, in fact, an

acceptance by the Senate of the position taken by the House. (*Congressional Globe*, Thirty-ninth Congress, Second Session, p. 1340.)

Then a question was asked, whether it would be necessary that the Senate should concur in all other appointments, etc.; in reply to which Mr. Schenck said:

That is the case. But their terms of office —

That is, the Secretaries' terms of office —

are limited, as they are not now limited by law, so that they expire with the term of service of the President who appoints them, and one month after, in case of death or other accident, until others can be substituted for them by the incoming President. (*Ibid.*)

Allow me to repeat that sentence:

They expire with the term of service of the President who appoints them, and one month after, in case of death or other accident.

In this body, on the report being made, the chairman, Hon. Mr. Williams, made an explanation. That explanation was in substance the same as that made by Mr. Schenck in the House, and thereupon a considerable debate sprang up, which was not the case in the House, for this explanation of Mr. Schenck was accepted by the House as correct, and unquestionably was acted upon by the House as giving the true sense, meaning, and effect of this bill. In this body, as I have said, a considerable debate sprang up. It would take too much of your time and too much of my strength to undertake to read this debate, and there is not a great deal of it which I can select so as to present it fairly and intelligibly without reading the accompanying parts; but I think the whole of it may fairly be summed up in this statement: that it was charged by one of the honorable Senators from Wisconsin that it was the intention of those who favored this bill to keep in



office Mr. Stanton and certain other Secretaries. That was directly met by the honorable Senator from Ohio, one of the members of the committee of conference, by this statement:

I do not understand the logic of the Senator from Wisconsin. He first attributes a purpose to the committee of conference which I say is not true. I say that the Senate have not legislated with a view to any persons or any President, and therefore he commences by asserting what is not true. We do not legislate in order to keep in the Secretary of War, the Secretary of the Navy, or the Secretary of State. (*Ibid.*, p. 1516.)

Then a conversation arose between the honorable Senator from Ohio and another honorable Senator, and the honorable Senator from Ohio continued thus:

That the Senate had no such purpose is shown by its vote twice to make this exception. That this provision does not apply to the present case is shown by the fact that its language is so framed as not to apply to the present President. The Senator shows that himself, and argues truly that it would not prevent the present President from removing the Secretary of War, the Secretary of the Navy, and the Secretary of State. And if I supposed that either of these gentlemen was so wanting in manhood, in honor, as to hold his place after the politest intimation by the President of the United States that his services were no longer needed, I certainly, as a Senator, would consent to his removal at any time, and so would we all. (*Ibid.*, p. 1516.)

I read this, Senators, not as expressing the opinion of an individual Senator concerning the meaning of a law which was under discussion and was about to pass into legislation. I read it as the report; for it is that in effect — the explanation, rather, of the report of the committee of conference appointed by this body to see whether this body could agree with the House of Representatives in the frame of this bill, which committee came back here with a report that a certain alteration had been made and agreed upon by the committee of conference, and that its effect was what is

above stated. And now I ask the Senate, looking at the language of this law, looking at its purpose, looking at the circumstances under which it was passed, the meaning thus attached to it by each of the bodies which consented to it, whether it is possible to hold that Mr. Stanton's case is within the scope of that Tenure-of-Office Act? I submit it is not possible.

I now return to the allegations in this first article; and the first allegation, as Senators will remember, is that the issuing of the order which is set out in the article was a violation of the Tenure-of-Office Act. It is perfectly clear that that is not true. The Tenure-of-Office Act in its sixth section enacts "that every removal, appointment, or employment, made, had, or exercised, contrary to the provisions of this act," etc., shall be deemed a high misdemeanor. "Every removal contrary to the provisions of this act." In the first place no removal has taken place. They set out an order. If Mr. Stanton had obeyed that order there would have been a removal; but, inasmuch as Mr. Stanton disobeyed that order, there was no removal. So it is quite clear that, looking to this sixth section of the act, they have made out no case of a removal within its terms; and, therefore, no case of violation of the act by a removal. But it must not only be a removal, it must be "contrary to the provisions of this act"; and, therefore, if you could hold the order to be in effect a removal, unless Mr. Stanton's case was within this act, unless this act gave Mr. Stanton a tenure of office and protected it, of course the removal, even if it had been actual instead of attempted merely, would not have been "contrary to the provisions of the act," for the act had nothing to do with it.

But this article, as Senators will perceive on looking at it, does not allege simply that the order for the removal of Mr. Stanton was a violation of the Tenure-of-Office Act. The honorable House of Representatives have not, by this

article, attempted to erect a mistake into a crime. I have been arguing to you at considerable length, no doubt trying your patience thereby, the construction of that Tenure-of-Office Law. I have a clear idea of what its construction ought to be. Senators, more or less of them who have listened to me, may have a different view of its construction, but I think they will in all candor admit that there is a question of construction; there is a question what the meaning of this law was; a question whether it was applicable to Mr. Stanton's case; a very honest and solid question which any man could entertain, and therefore I repeat it is important to observe that the honorable House of Representatives have not, by this article, endeavored to charge the President with a high misdemeanor because he had been honestly mistaken in construing that law. They go further and take the necessary step. They charge him with intentionally misconstruing it; they say, "Which order was unlawfully issued with intention then and there to violate said act." So that, in order to maintain the substance of this article, without which it was not designed by the House of Representatives to stand and cannot stand, it is necessary for them to show that the President willfully misconstrued this law; that having reason to believe and actually believing, after the use of due inquiry, that Mr. Stanton's case was within the law, he acted as if it was not within the law. That is the substance of the charge.

What is the proof in support of that allegation offered by the honorable Managers? Senators must undoubtedly be familiar with the fact that the office of President of the United States, as well as many other executive offices, and, to some extent, legislative offices, call upon those who hold them for the exercise of judgment and skill in the construction and application of laws. It is true that the strictly judicial power of the country, technically speaking, is vested in the Supreme Court and such inferior courts as

Congress from time to time have established or may establish. But there is a great mass of work to be performed by executive officers in the discharge of their duties, which is of a judicial character. Take, for instance, all that is done in the auditing of accounts; that is judicial whether it be done by an auditor or a comptroller, or whether it be done by a chancellor; and the work has the same character whether done by one or by the other. They must construe and apply the laws; they must investigate and ascertain facts; they must come to some results compounded of the law and of the facts.

Now, this class of duties the President of the United States has to perform. A case is brought before him, which, in his judgment, calls for action; his first inquiry must be, What is the law on the subject? He encounters, among other things, this Tenure-of-Office Law in the course of his inquiry. His first duty is to construe that law; to see whether it applies to the case; to use, of course, in doing so, all those means and appliances which the Constitution and the laws of the country have put into his hands to enable him to come to a correct decision. But, after all, he must decide, in order either to act or to refrain from action.

That process the President in this case was obliged to go through, and did go through; and he came to the conclusion that the case of Mr. Stanton was not within this law. He came to that conclusion, not merely by an examination of this law himself, but by resorting to the advice which the Constitution and laws of the country enable him to call for to assist him in coming to a correct conclusion. Having done so, are the Senate prepared to say that the conclusion he reached must have been a willful misconstruction — so willful, so wrong, that it can justly and properly, and for the purpose of this prosecution, effectively be termed a high misdemeanor? How does the law read? What are its purposes and objects? How was it understood

here at the time when it was passed? How is it possible for this body to convict the President of the United States of a high misdemeanor for construing a law as those who made it construed it at the time when it was made?

I submit to the Senate that thus far no great advance has been made toward the conclusion either that the allegation in this article that this order was a violation of the Tenure-of-Office Act is true, or that there was an intent on the part of the President thus to violate it. And, although we have not yet gone over all the allegations in this article, we have met its "head and front," and what remains will be found to be nothing but incidental and circumstantial, and not the principal subject. If Mr. Stanton was not within this act, if he held the office of Secretary for the Department of War at the pleasure of President Johnson, as he held it at the pleasure of President Lincoln, if he was bound by law to obey that order which was given to him, and quit the place, instead of being sustained by law in resisting that order, I think the honorable Managers will find it extremely difficult to construct out of the broken fragments of this article anything which will amount to a high misdemeanor. What are they? They are, in the first place, that the President did violate, and intended to violate, the Constitution of the United States by giving this order. Why? They say, as I understand it, because the order of removal was made during the session of the Senate; that for that reason the order was a violation of the Constitution of the United States.

I desire to be understood on this subject. If I can make my own ideas of it plain, I think nothing is left of this allegation. In the first place, the case, as Senators will observe, which is now under consideration, is the case of a Secretary of War holding during the pleasure of the President by the terms of his commission; holding under the Act of 1789, which created that Department, which, although it does

not affect to confer on the President the power to remove the Secretary, does clearly imply that he has that power by making a provision for what shall happen in case he exercises it. That is the case which is under consideration, and the question is this: whether under the law of 1789 and the tenure of office created by that law, designedly created by that law, after the great debate of 1789, and whether under a commission which conforms to it, holding during the pleasure of the President, the President could remove such a Secretary during the session of the Senate. Why not? Certainly there is nothing in the Constitution of the United States to prohibit it. The Constitution has made two distinct provisions for filling offices. One is by nomination to the Senate and confirmation by them and a commission by the President upon that confirmation. The other is by commissioning an officer when a vacancy happens during a recess of the Senate. But the question now before you is not a question how vacancies shall be filled; that the Constitution has thus provided for; it is a question how they may be created and when they may be created — a totally distinct question.

Whatever may be thought of the soundness of the conclusion arrived at upon the great debate in 1789 concerning the tenure of office, or concerning the power of removal from office, no one, I suppose, will question that a conclusion was arrived at; and that conclusion was that the Constitution had lodged with the President the power of removal from office independently of the Senate. This may be a decision proper to be reversed; it may have been now reversed; of that I say nothing at present; but that it was made, and that the legislation of Congress in 1789 and so on down during the whole period of legislation to 1867 proceeded upon the assumption, express or implied, that that decision had been made, nobody who understands the history of the legislation of the country will deny.

Consider, if you please, what this decision was. It was that the Constitution had lodged this power in the President; that he alone was to exercise it; that the Senate had not, and could not have, any control whatever over it. If that be so, of what materiality is it whether the Senate is in session or not? If the Senate is not in session, and the President has this power, a vacancy is created, and the Constitution has made provision for filling that vacancy by commission until the end of the next session of the Senate. If the Senate is in session, then the Constitution has made provision for filling a vacancy which is created by a nomination to the Senate; and the laws of the country, as I am presently going to show you somewhat in detail, have made provisions for filling it *ad interim* without any nomination, if the President is not prepared to make a nomination at the moment when he finds the public service requires the removal of an officer. So that, if this be a case within the scope of the decision made by Congress in 1789, and within the scope of the legislation which followed upon that decision, it is a case where, either by force of the Constitution the President had the power of removal without consulting the Senate, or else the legislation of Congress had given it to him; and either way neither the Constitution nor the legislation of Congress had made it incumbent on him to consult the Senate on the subject.

I submit, then, that if you look at this matter of Mr. Stanton's removal just as it stands on the decision in 1789 or on the legislation of Congress following upon that decision, and in accordance with which are the terms of the commission under which Mr. Stanton held office, you must come to the conclusion, without any further evidence on the subject, that the Senate had nothing whatever to do with the removal of Mr. Stanton, either to advise for it or to advise against it; that it came either under the constitutional power of the President as it had been interpreted in

1789 or it came under the grant made by the Legislature to the President in regard to all those Secretaries not included within the Tenure-of-Office Bill. This, however, does not rest simply upon this application of the Constitution and of the legislation of Congress. There has been, and we shall bring it before you, a practice by the Government, going back to a very early day, and coming down to a recent period, for the President to make removals from office when the case called for them, without regard to the fact whether the Senate was in session or not. The instances, of course, would not be numerous. If the Senate was in session the President would send a nomination to the Senate saying, "A B in place of C D, removed"; but then there were occasions, not frequent, I agree, but there were occasions, as you will see might naturally happen, when the President, perhaps, had not had time to select a person whom he would nominate, and when he could not trust the officer then in possession of the office to continue in it, when it was necessary for him by a special order to remove him from the office wholly independent of any nomination sent in to the Senate. Let me bring before your consideration for a moment a very striking case which happened recently enough to be within the knowledge of many of you. We were on the eve of a civil war; the War Department was in the hands of a man who was disloyal and unfaithful to his trust; his chief clerk who, on his removal or resignation, would come into the place, was believed to be in the same category with his master. Under those circumstances the President of the United States said to Mr. Floyd, "I must have possession of this office"; and Mr. Floyd had too much good sense or good manners or something else to do anything but resign; and instantly the President put into the place General Holt, the Postmaster-General of the United States at the time, without the delay of an hour. It was a time when a delay of twenty-four hours might



have been of vast practical consequence to the country. There are classes of cases arising in all the Departments of that character followed by that action; and we shall bring before you evidence showing what those cases have been, so that it will appear that so long as officers held at the pleasure of the President and wholly independent of the advice which he might receive in regard to their removal from the Senate, so long, whenever there was an occasion, the President used the power, whether the Senate was in session or not.

I have now gone over, Senators, the considerations which seem to me to be applicable to the Tenure-of-Office Bill, and to this allegation which is made that the President knowingly violated the Constitution of the United States in the order for the removal of Mr. Stanton from office while the Senate was in session; and the counsel for the President feel that it is not essential to his vindication from this charge to go further upon this subject. Nevertheless, there is a broader view of this matter, which is an actual part of the case, and it is due to the President it should be brought before you, that I now propose to open to your consideration.

The Constitution requires the President of the United States to take care that the laws be faithfully executed. It also requires of him, as a qualification for his office, to swear that he will faithfully execute the laws, and that, to the best of his ability, he will preserve, protect, and defend the Constitution of the United States. I suppose every one will agree that so long as the President of the United States, in good faith, is endeavoring to take care that the laws be faithfully executed, and in good faith and to the best of his ability is preserving, protecting, and defending the Constitution of the United States, although he may be making mistakes, he is not committing high crimes or misdemeanors.

In the execution of these duties the President found, for reasons which it is not my province at this time to enter upon, but which will be exhibited to you hereafter, that it was impossible to allow Mr. Stanton to continue to hold the office of one of his advisers, and to be responsible for his conduct in the manner he was required by the Constitution and laws to be responsible, any longer. This was intimated to Mr. Stanton, and did not produce the effect which, according to the general judgment of well-informed men, such intimations usually produce. Thereupon the President first suspended Mr. Stanton, and reported that to the Senate. Certain proceedings took place which will be adverted to more particularly presently. They resulted in the return of Mr. Stanton to the occupation by him of this office. Then it became necessary for the President to consider, first, whether this Tenure-of-Office Law applied to the case of Mr. Stanton; secondly, if it did apply to the case of Mr. Stanton, whether the law itself was the law of the land, or was merely inoperative because it exceeded the constitutional power of the Legislature.

I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizens or public officers. If this is the measure of duty, there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to Senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country. Will any man question the patriotism or the propriety of John Hampden's act when he brought the

question whether "ship money" was within the Constitution of England before the courts of England? Not only is there no such rule incumbent upon private citizens which forbids them to raise such questions, but, let me repeat, there may be, as there not unfrequently have been, instances in which the highest patriotism and the purest civil and moral duty require it to be done. Let me ask any one of you, if you were a trustee for the rights of third persons, and those rights of third persons, which they could not defend themselves by reason, perhaps, of sex or age, should be attacked by an unconstitutional law, should you not deem it to be your sacred duty to resist it and have the question tried? And, if a private trustee may be subject to such a duty, and impelled by it to such action, how is it possible to maintain that he who is a trustee for the people of powers confided to him for their protection, for their security, for their benefit, may not, in that character of trustee, defend what has thus been confided to him?

Do not let me be misunderstood on this subject. I am not intending to advance upon or occupy any extreme ground, because no such extreme ground has been advanced upon or occupied by the President of the United States. He is to take care that the laws are faithfully executed. When a law has been passed through the forms of legislation, either with his assent or without his assent, it is his duty to see that that law is faithfully executed so long as nothing is required of him but ministerial action. He is not to erect himself into a judicial court and decide that the law is unconstitutional, and that therefore he will not execute it; for, if that were done, manifestly there never could be a judicial decision. He would not only veto a law, but he would refuse all action under the law after it had been passed, and thus prevent any judicial decision from being made. He asserts no such power. He has no such idea of his duty. His idea of his duty is that if a law is

passed over his veto which he believes to be unconstitutional, and that law affects the interests of third persons, those whose interests are affected must take care of them, vindicate them, raise questions concerning them, if they should be so advised. If such a law affects the general and public interests of the people the people must take care at the polls that it is remedied in a constitutional way.

But when, Senators, a question arises whether a particular law has cut off a power confided to him by the people through the Constitution, and he alone can raise that question, and he alone can cause a judicial decision to come between the two branches of the Government to say which of them is right, and, after due deliberation, with the advice of those who are his proper advisers, he settles down firmly upon the opinion that such is the character of the law, it remains to be decided by you whether there is any violation of his duty when he takes the needful steps to raise that question and have it peacefully decided.

Where shall the line be drawn? Suppose a law should provide that the President of the United States should not make a treaty with England or with any other country? It would be a plain infraction of his constitutional power, and if an occasion arose when such a treaty was in his judgment expedient and necessary it would be his duty to make it; and the fact that it should be declared to be a high misdemeanor if he made it would no more relieve him from the responsibility of acting through the fear of that law than he would be relieved of that responsibility by a bribe not to act.

Suppose a law that he shall not be Commander-in-Chief in part or in whole—a plain case, I will suppose, of an infraction of that provision of the Constitution which has confided to him that command; the Constitution intending that the head of all the military power of the country should be a civil magistrate, to the end that the law may always be

superior to arms. Suppose he should resist a statute of that kind in the manner I have spoken of by bringing it to a judicial decision?

It may be said these are plain cases of express infractions of the Constitution; but what is the difference between a power conferred upon the President by the express words of the Constitution and a power conferred upon the President by a clear and sufficient implication in the Constitution? Where does the power to make banks come from? Where does the power come from to limit Congress in assigning original jurisdiction to the Supreme Court of the United States, one of the cases referred to the other day? Where do a multitude of powers upon which Congress acts come from in the Constitution except by fair implications? Whence do you derive the power, while you are limiting the tenure of office, to confer on the Senate the right to prevent removals without their consent? Is that expressly given in the Constitution, or is it an implication which is made from some of its provisions?

I submit it is impossible to draw any line of duty for the President simply because a power is derived from an implication in the Constitution instead of from an express provision. One thing unquestionably is to be expected of the President on all such occasions, that is, that he should carefully consider the question; that he should ascertain that it necessarily arises; that he should be of opinion that it is necessary to the public service that it should be decided; that he should take all competent and proper advice on the subject. When he has done all this, if he finds that he cannot allow the law to operate in the particular case without abandoning a power which he believes has been confided to him by the people, it is his solemn conviction that it is his duty to assert the power and obtain a judicial decision thereon. And although he does not perceive, nor do his counsel perceive, that it is essential to his defense in

this case to maintain this part of the argument, nevertheless, if this tribunal should be of that opinion, then before this tribunal, before all the people of the United States, and before the civilized world, he asserts the truth of this position.

I am compelled now to ask your attention, quite briefly, however, to some considerations which weighed upon the mind of the President and led him to the conclusion that this was one of the powers of his office which it was his duty, in the manner I have indicated, to endeavor to preserve.

The question whether the Constitution has lodged the power of removal with the President alone, with the President and Senate, or left it to Congress to be determined at its will in fixing the tenure of offices, was, as all Senators know, debated in 1789 with surpassing ability and knowledge of the frame and necessities of our Government.

Now, it is a rule long settled, existing, I suppose, in all civilized countries, certainly in every system of law that I have any acquaintance with, that a contemporary exposition of a law made by those who were competent to give it a construction is of very great weight; and that when such contemporary exposition has been made of a law, and it has been followed by an actual and practical construction in accordance with that contemporary exposition, continued during a long period of time and applied to great numbers of cases, it is afterward too late to call in question the correctness of such a construction. The rule is laid down, in the quaint language of Lord Coke, in this form:

Great regard ought, in construing a law, to be paid to the construction which the sages who lived about the time or soon after it was made put upon it, because they were best able to judge of the intention of the makers at the time when the law was made. *Contemporanea expositio est fortissima in legem.*

I desire to bring before the Senate in this connection, inasmuch as I think the subject has been frequently mis-

understood, the form taken by that debate of 1789 and the result which was attained. In order to do so, and at the same time to avoid fatiguing your attention by looking minutely into the debate itself, I beg leave to read a passage from Chief Justice Marshall's *Life of Washington*, where he has summed up the whole. The writer says, on page 162 of the second volume of the Philadelphia edition:

After an ardent discussion, which consumed several days, the committee divided, and the amendment was negatived by a majority of thirty-four to twenty. The opinion thus expressed by the House of Representatives did not explicitly convey their sense of the Constitution. Indeed, the express grant of the power to the President rather implied a right in the Legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson moved in the House, when the report of the Committee of the Whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal to be solely in the President. He gave notice that if he should succeed in this he would move to strike out the words which had been the subject of debate. If those words continued, he said, the power of removal by the President might hereafter appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability; when he was well satisfied in his own mind that it was by fair construction fixed in the Constitution. The motion was seconded by Mr. Madison, and both amendments were adopted. As the bill passed into a law, it has ever been considered as a full expression of the sense of the Legislature on this important part of the American Constitution.

Some allusion has been made to the fact that this law was passed in the Senate only by the casting vote of the Vice-President; and upon that subject I beg leave to refer to the life of Mr. Adams by his grandson, volume one of his works, pages 448 to 450. He here gives an account, so far as could be ascertained from the papers of President Adams, of what that debate was, and finally terminates the subject in this way:

These reasons —

That is, the reasons of Vice-President Adams —

were not committed to paper, however, and can therefore never be known. But in their soundness it is certain that he never had the shadow of a doubt.

I desire leave, also, to refer on this subject to the first volume of Story's *Commentaries on the Constitution*, section four hundred and eight, in support of the rule of interpretation which I have stated to the Senate. It will there be found that it is stated by the learned commentator that a contemporaneous construction of the Constitution made under certain circumstances, which he describes, is of very great weight in determining its meaning. He says:

After all, the most unexceptionable source of collateral interpretation is from the practical exposition of the Government itself in its various departments upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solemn argument, *pro re nata*, upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument from their exquisite genius, their comprehensive learning, or their deep meditation upon the absorbing topic. How light, compared with these means of instruction, are the private lucubrations of the closet or the retired speculations of ingenious minds, intent on theory or general views, and unused to encounter a practical difficulty at every step!

On comparing the decision made in 1789 with the tests which are here suggested by the learned commentator, it will be found, in the first place, that the precise question was under discussion; secondly, that there was a deep sense of its importance, for it was seen that the decision was not to affect a few cases lying here and there in the course of



the Government, but that it would enter deeply into its practical and daily administration; and, in the next place, the determination was, so far as such determination could be entertained, thereby to fix a system for the future; and, in the last place, the men who participated in it must be admitted to have been exceedingly well qualified for their work.

There is another rule to be added to this, which is also one of very frequent application, and it is that a long-continued practical application of a decision of this character by those to whom the execution of a law is confided is of decisive weight. To borrow again from Lord Coke on this subject, "*Optimus legum interpretres consuetudo*" — "Practice is the best interpreter of law." Now, what followed this original decision? From 1789 down to 1867 every President and every Congress participated in and acted under the construction given in 1789. Not only did the Government so conduct, but it was a subject sufficiently discussed among the people to bring to their consideration that such a question had existed, had been started, had been settled in this manner, had been raised again from time to time, and yet, as everybody knows, so far from the people interfering with this decision, so far from ever expressing in any manner their disapprobation of the practice which had grown up under it, not one party nor two parties but all parties favored and acted upon this system of Government. . . .

This is a subject which has been heretofore examined and passed upon judicially in very numerous cases. I do not speak now, of course, of judicial decisions of this particular question which is under consideration, whether the Constitution has lodged the power of removal in the President alone, or in the President and Senate, or has left it to be a part of the legislative power; but I speak of the judicial exposition of the effect of such a practical construction of

the Constitution of the United States originated in the way in which this was originated, continued in the way in which this was continued, and sanctioned in the way in which this has been sanctioned.

There was a very early case that arose soon after the organization of the Government, and which is reported under the name of *Stuart vs. Laird*, in 1 Cranch's Reports, 299. It was a question concerning the interpretation of the Constitution concerning the power which the Congress had to assign to the judges of the Supreme Court circuit duties. From that time down to the decision in the case of *Cooley vs. The Port Wardens of Philadelphia*, reported in 12 Howard, 315, a period of more than half a century, there has been a series of decisions upon the effect of such a contemporaneous construction of the Constitution, followed by such a practice in accordance with it; and it is now a fixed and settled rule, which, I think, no lawyer will undertake to controvert, that the effect of such a construction is not merely to give weight to an argument, but to fix an interpretation. And accordingly it will be found by looking into the books written by those who were conversant with this subject that they have so considered and received it. I beg leave to refer to the most eminent of all the commentators on American law, and to read a line or two from Chancellor Kent's Lectures, found in the first volume, page 310, marginal paging. After considering this subject, — and, it should be noted in reference to this very learned and experienced jurist, considering it in an unfavorable light, because he himself thought that as an original question it had better have been settled the other way, that it would have been more logical, more in conformity with his views of what the practical needs of the Government were, that the Senate should participate with the President in the power of removal, — nevertheless he sums it all up in these words:

This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. It applies equally to every other officer of the Government appointed by the President and Senate whose term of duration is not specially declared. It is supported by the weighty reason that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it.

This, I believe, will be found to be a fair expression of the opinions of those who have had occasion to examine this subject in their closets or as a matter of speculation.

In this case, however, the President of the United States had to consider not merely the general question where this power was lodged, not merely the effect of this decision made in 1789, and the practice of the Government under it since, but he had to consider a particular law, the provisions of which were before him, and might have an application to the case upon which he felt called upon to act; and it is necessary, in order to do justice to the President in reference to this matter, to see what the theory of that law is and what its operation is or must be, if any, upon the case which he had before him; namely, the case of Mr. Stanton.

During the debate in 1789 there were three distinct theories held by different persons in the House of Representatives. One was that the Constitution had lodged the power of removal with the President alone; another was that the Constitution had lodged that power with the President, acting with the advice and consent of the Senate; the third was that the Constitution had lodged it nowhere, but had left it to the legislative power, to be acted upon in connection with the prescription of the tenure of office.

The last of these theories was at that day held by comparatively few persons. The first two received not only much the greatest number of votes but much the greatest weight of reasoning in the course of that debate; so much so that when this subject came under the consideration of the Supreme Court of the United States, in the case of *Ex parte Hennan*, collaterally only, Mr. Justice Thompson, who delivered the opinion of the Court on that occasion, says that it has never been doubted that the Constitution had lodged the power either in the President alone or in the President and Senate — certainly an inaccuracy; but then it required a very close scrutiny of the debates and a careful examination of the few individual opinions expressed in that debate, in that direction, to ascertain that it ever had been doubted that, one way or the other, the Constitution settled the question.

Nevertheless, as I understand it — I may be mistaken in this — but, as I understand it, it is the theory of this law which the President had before him, that both these opinions were wrong; that the Constitution has not lodged the power anywhere; that it has left it as an incident to the legislative power, which incident may be controlled, of course, by the Legislature itself, according to its own will; because, as Chief Justice Marshall somewhere remarks (and it is one of those profound remarks which will be found to have been carried by him into many of his decisions), when it comes to a question whether a power exists, the particular mode in which it may be exercised must be left to the will of the body that possesses it; and, therefore, if this be a legislative power, it was very apparent to the President of the United States, as it had been very apparent to Mr. Madison, as was declared by him in the course of his correspondence with Mr. Coles, which is, no doubt, familiar to Senators, that if this be a legislative power the Legislature may lodge it in the Senate, may re-

tain it in the whole body of Congress, the two Houses of Congress, or may give it to the House of Representatives. I repeat, the President had to consider this particular law; and that, as I understand it, is the theory of that law. I do not undertake to say it is an unfounded theory; I do not undertake to say that it may not be maintained successfully; but I do undertake to say that it is one which was originally rejected by the ablest minds that had this subject under consideration in 1789; that, whenever the question has been started since, it has had, to a recent period, very few advocates; and that no fair and candid mind can deny that it is capable of being doubted and disbelieved after examination. It may be the truth, after all; but it is not a truth which shines with such clear and certain light that a man is guilty of a crime because he does not see it.

The President not only had to consider this particular law, but he had to consider its constitutional application to this particular case, supposing the case of Mr. Stanton to be, what I have endeavored to argue it was not, within its terms. Let us assume, then, that his case was within its terms; let us assume that this proviso, in describing the cases of Secretaries, described the case of Mr. Stanton; that Mr. Stanton, having been appointed by President Lincoln in January, 1862, and commissioned to hold during the pleasure of the President, by force of this law acquired a right to hold this office against the will of the President down to April, 1869. Now, there is one thing which has never been doubted under the Constitution, is incapable of being doubted, allow me to say, and that is, that the President is to make the choice of officers. Whether, having made the choice, and they being inducted into office, they can be removed by him alone, is another question. But to the President alone is confided the power of choice. In the first place, he alone can nominate. When the Senate has advised the nomination, consented to the nomination, he is

not bound to commission the officer. He has a second opportunity for consideration, and acceptance or rejection of the choice he had originally made. On this subject allow me to read from the opinion of Chief Justice Marshall, in the case of *Marbury vs. Madison*, where it is expressed more clearly than I can express it. After enumerating the different clauses of the Constitution which bear upon this subject, he says:

These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations:

1. The nomination. This is the sole act of the President, and is completely voluntary.

2. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

3. The commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States." (1 *Cranch*, 155.)

He then goes into various considerations to show that it is not a duty enjoined by the Constitution; that it is optional with him whether he will commission even after an appointment has been confirmed, and he says:

The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. (*Ibid.*, 157.)

The choice, then, is with the President. The action of the Senate upon that choice is an advisory action only at a particular stage after the nomination, before the appointment or the commission. Now, as I have said before, Mr. Stanton was appointed under the law of 1789, constituting the War Department, and in accordance with that law

he was commissioned to hold during the pleasure of the President. President Lincoln had said to the Senate, "I nominate Mr. Stanton to hold the office of Secretary for the Department of War during the pleasure of the President." The Senate had said, "We assent to Mr. Stanton's holding the office of Secretary for the Department of War during the pleasure of the President." What does this Tenure-of-Office Law say, if it operates on the case of Mr. Stanton? It says Mr. Stanton shall hold office against the will of the President, contrary to the terms of his commission, contrary to the law under which he was appointed, down to the 4th of April, 1869. For this new, fixed, and extended term, where is Mr. Stanton's commission? Who has made the appointment? Who has assented to it? It is a legislative commission; it is a legislative appointment; it is assented to by Congress acting in its legislative capacity. The President has had no voice in the matter. The Senate, as the advisers of the President, have had no voice in the matter. If he holds at all, he holds by force of legislation, and not by any choice made by the President, or assented to by the Senate. And this was the case, and the only case, which the President had before him, and on which he was called to act.

Now, I ask Senators to consider whether, for having formed an opinion that the Constitution of the United States had lodged this power with the President — an opinion which he shares with every President who has preceded him, with every Congress which has preceded the last; an opinion formed on the grounds which I have imperfectly indicated; an opinion which, when applied to this particular case, raises the difficulties which I have indicated here, arising out of the fact that this law does not pursue either of the opinions which were originally held in this Government, and have occasionally been started and maintained by those who are restless under its administration;

an opinion thus supported by the practice of the Government from its origin down to his own day, — is he to be impeached for holding that opinion? If not, if he might honestly and properly form such an opinion under the lights which he had, and with the aid of the advice which we shall show you he received, then is he to be impeached for acting upon it to the extent of obtaining a judicial decision whether the executive department of the Government was right in its opinion, or the legislative department was right in its opinion? Strangely enough, as it struck me, the honorable Managers themselves say, “No; he is not to be impeached for that. I beg leave to read a passage from the argument of the honorable Manager by whom the prosecution was opened:

If the President had really desired solely to test the constitutionality of the law or his legal right to remove Mr. Stanton, instead of his defiant message to the Senate of the 21st of February, informing them of the removal, but not suggesting this purpose, which is thus shown to be an afterthought, he would have said, in substance: “Gentlemen of the Senate, in order to test the constitutionality of the law entitled, ‘An act regulating the tenure of certain civil offices,’ which I verily believe to be unconstitutional and void, I have issued an order of removal of E. M. Stanton from the office of Secretary of the Department of War. I felt myself constrained to make this removal lest Mr. Stanton should answer the information in the nature of a *quo warranto*, which I intend the Attorney-General shall file at an early day, by saying that he holds the office of Secretary of War by the appointment and authority of Mr. Lincoln, which has never been revoked. Anxious that there shall be no collision or disagreement between the several departments of the Government and the Executive, I lay before the Senate this message, that the reasons for my action, as well as the action itself, for the purpose indicated, may meet your concurrence.”

Thus far are marks of quotation showing the communication which the President should have obtained from the honorable Manager and sent to the Senate in order to make this matter exactly right. Then follows this:



Had the Senate received such a message, the Representatives of the people might never have deemed it necessary to impeach the President for such an act to insure the safety of the country, even if they had denied the accuracy of his legal positions.

So that it seems that it is, after all, not the removal of Mr. Stanton but the manner in which the President communicated the fact of that removal to the Senate after it was made. That manner is called here the "defiant message" of the 21st of February. That is a question of taste. I have read the message as you all have read it. If you can find anything in it but what is decorous and respectful to this body and to all concerned, your taste will differ from mine. But whether it be a point of manners well or ill taken, one thing seems to be quite clear: that the President is not impeached here because he entertained an opinion that this law was unconstitutional; he is not impeached here because he acted on that opinion and removed Mr. Stanton; but he is impeached here because the House of Representatives considers that this honorable body was addressed by a "defiant message," when they should have been addressed in the terms which the honorable Manager has dictated.

I now come, Mr. Chief Justice and Senators, to another topic connected with this matter of the removal of Mr. Stanton and the action of the President under this law. The honorable Managers take the ground, among others, that whether upon a true construction of this Tenure-of-Office Act Mr. Stanton be within it, or even if you should believe that the President thought the law unconstitutional and had a right, if not trammelled in some way, to try that question, still by his own conduct and declarations the President, as they phrase it, is estopped. He is not to be permitted here to assert the true interpretation of this law; he is not to be permitted to allege that his purpose was to raise a question concerning its constitutionality; and the reason is that he has done and said certain things. All of

us who have read law books know that there is in the common law a doctrine called rules of estoppel, founded, undoubtedly, on good reason, although, as they are called from the time of Lord Coke, or even earlier, down to the present day, odious, because they shut out the truth. Nevertheless there are circumstances when it is proper that the truth should be shut out. What are the circumstances? They are where a question of private right is involved, where on a matter of fact that private right depends, and where one of the parties to the controversy has so conducted himself that he ought not in good conscience to be allowed either to assert or deny that matter of fact.

But did any one ever hear of an estoppel on a matter of law? Did any one ever hear that a party had put himself into such a condition that when he came into a court of justice even to claim a private right, he could not ask the judge correctly to construe a statute, and insist on the construction when it was arrived at in his favor? Did anybody ever hear, last of all, that a man was convicted of crime by reason of an estoppel under any system of law that ever prevailed in any civilized State? That the President of the United States should be impeached and removed from office, not by reason of the truth of his case, but because he is estopped from telling it, would be a spectacle for gods and men. Undoubtedly it would have a place in history, which it is not necessary for me to attempt to foreshadow.

There is no matter of fact here. They have themselves put in Mr. Stanton's commission, which shows the date of the commission and the terms of the commission; and that is the whole matter of fact which is involved. The rest is the construction of the tenure of the Tenure-of-Office Act and the application of it to the case, which they have thus made themselves; and also the construction of the Constitution of the United States, and the abstract public

question whether that has lodged the power of removal with the President alone, or with the President and Senate, or left it to Congress. I respectfully submit, therefore, that the ground is untenable that there can be an estoppel by any conduct of the President, who comes here to assert not a private right, but a great public right confided to the office by the people, in which, if anybody is estopped, the people will be estopped. The President never could do or say anything which would put this great public right into that extraordinary predicament.

But what has he done? What are the facts upon which they rely, out of which to work this estoppel, as they call it? In the first place, he sent a message to the Senate on the 12th of December, 1867, in which he informed the Senate that he had suspended Mr. Stanton by a certain order, a copy of which he gave; that he had appointed General Grant to exercise the duties of the office *ad interim* by a certain other order, a copy of which he gave; and then he entered into a discussion in which he showed the existence of this question, whether Mr. Stanton was within the Tenure-of-Office Bill; the existence of the other question, whether this was or was not a constitutional law; and then he invoked the action of the Senate. There was nothing misrepresented. There was nothing concealed which he was bound to state. It is complained of by the honorable Managers that he did not tell the Senate that, if their action should be such as to restore Mr. Stanton practically to the possession of the office, he should go to law about it. That is the complaint: that he did not tell that to the Senate. It may have been a possible omission, though I rather think not. I rather think that that good taste which is so prevalent among the Managers, and which they so insist upon here, would hardly dictate that the President should have held out to the Senate something which might possibly have been construed into a threat upon that subject.

He laid the case before the Senate for their action; and now, forsooth, they say he was too deferential to this law, both by reason of this conduct of his, and also what he did upon other occasions, to which I shall presently advert.

Senators, there is no inconsistency in the President's position or conduct in reference to this matter. Suppose this case: a party who has a private right in question submits to the same tribunal in the same proceeding these questions: first, I deny the constitutionality of the law under which the right is claimed against me; second, I assert that the true interpretation of that law will not affect this right which is claimed against me; third, I insist that, even if it is within the law, I make a case within the law — is there any inconsistency in that? Is not that done every day, or something analogous to it, in courts of justice? And where was the inconsistency on this occasion? Suppose the President had summed up the message which he sent to the Senate in this way: "Gentlemen of the Senate, I insist, in the first place, that this law is unconstitutional; I insist, in the second place, that Mr. Stanton is not within it; I respectfully submit for your consideration whether, if it be a constitutional law and Mr. Stanton's case be within it, the facts which I present to you do not make such a case that you will not advise me to receive him back into office." Suppose he had summed up in that way, would there have been any inconsistency then? And why is not the substance of that found in this message? Here it is pointed out that the question existed whether the law was unconstitutional; here it is pointed out that the question existed whether Mr. Stanton was within the law; and then the President goes on to submit for the consideration of the Senate, who he had reason to believe, and did believe, thought the law was constitutional, though he had no reason to believe that they thought Mr. Stanton was within the law, the facts to be acted upon

within the law, if the case was there. It seems the President has not only been thus anxious to avoid a collision with this law; he has not only on this occasion taken this means to avoid it, but it seems that he has actually in some particulars obeyed the law; he has made changes in the commissions, or rather they have been made in the departments, and, as he has signed the commissions, I suppose they must be taken, although his attention does not appear to have been called to the subject at all, to have been made with his sanction, just so far, and because he sanctions that which is done by his Secretaries, if he does not interfere actively to prevent it.

He has done not merely this, but he has also in several cases — four cases: three collectors, and one consul, I think they are — sent into the Senate notice of suspension, notice that he had acted under this law and suspended these officers. This objection proceeds upon an entire misapprehension of the position of the President and of the views which he has of his own duty. It assumes that because, when the emergency comes, as it did come in the case of Mr. Stanton, when he must act or else abandon a power which he finds in the particular instance it is necessary for him to insist upon in order to carry on the Government; that because he holds that opinion he must run amuck against the law, and take every possible opportunity to give it a blow, if he can. He holds no such opinion.

So long as it is a question of administrative duty merely, he holds that he is bound to obey the law. It is only when the emergency arises, when the question is put to him so that he must answer it, "Can you carry on this department of the Government any longer in this way?" "No." "Have you power to carry it on as the public service demands?" "I believe I have." Then comes the question how he shall act. But whether a consul is to be suspended or removed, whether a defaulting collector is to be sus-

pended or removed, does not involve the execution of the great powers of the Government. It may be carried on; he may be of opinion with less advantage; he may be of opinion not in accordance with the requirements of the Constitution, but it may be carried on without serious embarrassment or difficulty. Until that question is settled he does not find it necessary to make it — settled in some way, by some person who has an interest to raise and have it settled.

I wish to observe, also (the correctness of which observation I think the Senate will agree with), that these changes which have been made in the forms of the commissions really have nothing to do with this subject; for instance, the change is made in the Department of State, "subject to the conditions prescribed by law." That is the tenure on which I think all commissions should originally have run, and ought to continue to run. It is general enough to embrace all. If it is a condition prescribed by law that the Senate must consent to the removal of the incumbent before he is rightfully out of office, it covers that case. If the Tenure-of-Office Bill be not a law of the land because it is not in accordance with the Constitution, it covers that case. It covers every case necessarily from its terms, for every officer does, and should, and must hold subject to the conditions prescribed by law — not necessarily a law of Congress, but a law of the land — the Constitution being supreme in that particular.

There is another observation, also, and that is, that the change that was made in the Department of the Treasury — "until a successor be appointed and qualified" — has manifestly nothing whatever to do with the subject of removal. Whether the power of removal be vested in the President alone, or vested in the President by and with the advice and consent of the Senate, this clause does not touch it. It is just as inconsistent with removal by the President with the consent of the Senate as it is inconsistent with the

removal by the President alone. In other words, it is the general tenure of the office which is described, according to which the officer is to continue to hold; but he and all other officers hold subject to some power of removal vested somewhere, and this change which has been made in the commission does not declare where it is vested, nor has it any influence on the question in whom it is vested.

I wish to add to this, that there is nothing, so far as I see, on this subject of estoppel, growing out of the action of the President, either in sending the message to the Senate of the 12th of December, or in the changes in the commissions, or in his sending to the Senate notices of suspensions of different officers, which has any bearing whatever upon the Tenure-of-Office Act as affecting the case of Mr. Stanton. That is a case that stands by itself. The law may be a constitutional law; it may not only be a law under which the President has acted in this instance, but under which he is bound to act, and is willing to act, if you please, in every instance; still, if Mr. Stanton is not within that law, the case remains as it was originally presented, and that case is, that, not being within that law, the first article is entirely without foundation. . . .

Mr. Chief Justice and Senators, among the points which I accidentally omitted to notice yesterday, was one to which it seems to me of sufficient importance to return, and for a few moments to ask the attention of the Senate to it. It will best be exhibited by reading from Saturday's proceedings a short passage. In the course of those proceedings Mr. Manager Butler said:

It will be seen, therefore, Mr. President and Senators, that the President of the United States says in his answer that he suspended Mr. Stanton under the Constitution, indefinitely and at his pleasure. I propose, now, unless it be objected to, to show that that is false under his own hand, and I have his letter to that effect, which, if there is no objection, I will read, the signature of which was identified by C. E. Creecy.

Then followed the reading of the letter, which was this:

EXECUTIVE MANSION,  
WASHINGTON, D.C., *August 14, 1867.*

SIR: In compliance with the requirements of the eighth section of the act of Congress of March 2, 1867, entitled "An act regulating the tenure of certain civil offices," you are hereby notified that on the 12th instant Hon. Edwin M. Stanton was suspended from office as Secretary of War and General Ulysses S. Grant authorized and empowered to act as Secretary of War *ad interim*.

I am, sir, very respectfully, yours,

ANDREW JOHNSON.

This is the letter which was to show, under the hand of the President, that when he said in his answer he did not suspend Mr. Stanton by virtue of the Tenure-of-Office Act that statement was a falsehood. Allow me now to read the eighth section of that act:

That whenever the President shall, without the advice and consent of the Senate, designate, authorize, or employ any person to perform the duties of any office he shall forthwith notify the Secretary of the Treasury thereof; and it shall be the duty of the Secretary of the Treasury thereupon to communicate such notice to all the proper accounting and disbursing officers of his Department.

The Senate will perceive that this section has nothing to do with the suspension of an officer and no description of what suspensions are to take place; but the purpose of the section is that if in any case the President, without the advice and consent of the Senate, shall, under any circumstances, designate a third person to perform temporarily the duties of an office, he is to make a report of that designation to the Secretary of the Treasury, and that officer is to give the necessary information of the event to his subordinate officers. The section applies in terms to and includes all cases. It applies to and includes cases of designation on account of sickness or absence or resignation or any



cause of vacancy, whether temporary or permanent, and whether occurring by reason of a suspension or of a removal from office. And therefore, when the President says to the Secretary of the Treasury, "I give you notice that I have designated General Thomas to perform the duties *ad interim* of Secretary of War," he makes no allusion, by force of that letter, to the manner in which that vacancy has occurred or the authority by which it has been created; and hence, instead of this letter showing, under the President's own hand, that he had stated a falsehood, it has no reference to the subject-matter of the power or the occasion of Mr. Stanton's removal.

Mr. Manager BUTLER. Read the second section, please; the first clause of it.

Mr. CURTIS. What did the Manager call for?

Mr. Manager BUTLER. Read the first clause of the second section of the act, which says that in no other case except when he suspends shall he appoint.

Mr. CURTIS. The second section provides:

That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the Senate, be shown by satisfactory evidence, etc.

The President is allowed to suspend such an officer. Now, the President states in his answer that he did not act under that section.

Mr. Manager BUTLER. That is not reading the section. That is not what I desired.

Mr. CURTIS. I am aware that is not reading the section, Mr. Manager. You need not point that out. It is a very long section, and I do not propose to read it.

Mr. Manager BUTLER. The first half a dozen lines.

Mr. CURTIS. This section authorizes the President to suspend in cases of crime and other cases which are described in this section. By force of it the President may

suspend an officer. This eighth section applies to all cases of temporary designations and appointments, whether resulting from suspensions under the second section, whether arising from temporary absence or sickness or death or resignation; no matter what the cause may be, if for any reason there is a temporary designation of a person to supply an office *ad interim*, notice is to be given to the Secretary of the Treasury; and therefore I repeat, Senators, that the subject-matter of this eighth section and the letter which the President wrote in consequence of it have no reference to the question under what authority he suspended Mr. Stanton.

I now ask the attention of the Senate to the second article in the series; and I will begin as I began before, by stating what the substance of this article is, what allegations it makes, so as to be the subjects of proof, and then the Senate will be prepared to see how far each one of these allegations is supported by what is already in the case, and I shall be enabled to state what we propose to offer by way of proof in respect to each of them. The substantive allegations of this second article are that the delivery of the letter of authority to General Thomas was without authority of law; that it was an intentional violation of the Tenure-of-Office Act; that it was an intentional violation of the Constitution of the United States; that the delivery of this order to General Thomas was made with intent to violate both that act and the Constitution of the United States. That is the substance of the second article. The Senate will at once perceive that if the suspension of Mr. Stanton was not a violation of the Tenure-of-Office Act in point of fact, or, to state it in other terms, if the case of Mr. Stanton is not within the act, then his removal, if he had been removed, could not be a violation of the act.

If his case is not within the act at all, if the act does not apply to the case of Mr. Stanton, of course his removal is

not a violation of that act. If Mr. Stanton continued to hold under the commission which he received from President Lincoln, and his tenure continued to be under the act of 1789, and under his only commission, which was at the pleasure of the President, it was no violation of the Tenure-of-Office Act for Mr. Johnson to remove, or attempt to remove, Mr. Stanton; and therefore the Senate will perceive that it is necessary to come back again, to recur under this article, as it will be necessary to recur under the whole of the first eight articles, to the inquiries, first, whether Mr. Stanton's case was within the Tenure-of-Office Act; and secondly, whether it was so clearly and plainly within that act that it can be attributed to the President as a high misdemeanor that he construed it not to include his case. But suppose the case of Mr. Stanton is within the Tenure-of-Office Act, still the inquiry arises, whether what was done in delivering this letter of authority to General Thomas was a violation of that act; and that renders it necessary that I should ask your careful attention to the general subject-matter of this act and the particular provisions which are inserted in it in reference to each of those subjects.

Senators will recollect undoubtedly that this law, as it was finally passed, differs from the bill as it was originally introduced. The law relates to two distinct subjects. One is removal from office, the other subject is appointments of a certain character made under certain circumstances to fill offices. It seems that a practice had grown up under the Government that where a person was nominated to the Senate to fill an office, and the Senate either did not act on his nomination during their session or rejected the nomination, after the adjournment of the Senate and in the recess it was considered competent for the President by a temporary commission to appoint that same person to that same office; and that was deemed by many Senators, unquestionably by a majority, and I should judge from read-

ing the debates by a large majority of the Senate, to be an abuse of power — not an intentional abuse. But it was a practice which had prevailed under the Government to a very considerable extent. It was not limited to very recent times. It had been supported by the opinions of different Attorneys-General given to different Presidents. But still it was considered by many Senators to be a departure from the spirit of the Constitution, and a substantial derogation from the just power of the Senate in respect to nominations for office. That being so, it will be found on an examination of this law that the first and second sections of the act relate exclusively to removals from office and temporary suspensions in the recess of the Senate; while the third section and several of the following sections, to which I shall ask your particular attention, relate exclusively to this other subject of appointments made to office after the Senate had refused to concur in the nomination of the person appointed. Allow me now to read from the third section:

That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation —

I pause here to remark that this does not include all cases. It does not include any case of the expiration of a commission. It includes simply death and resignation, not cases of the expiration of a commission during the recess of the Senate. Why these were thus omitted I do not know; but it is manifest that the law does not affect to, and in point of fact does not, cover all cases which might arise belonging to this general class to which this section was designed to refer.

The law goes on to say —

That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by granting commissions which shall expire at the

end of their next session thereafter. And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

Here all the described vacancies in office occurring during the recess of the Senate and the failure to fill those vacancies in accordance with the advice of the Senate are treated as occasioning an abeyance of such offices. That applies, as I have said, to two classes of cases, vacancies happening by reason of death or resignation. It does not apply to any other vacancies.

The next section of this law does not relate to this subject of filling offices, but to the subject of removals:

That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law.

The fifth section is:

That if any person shall, contrary to the provisions of this act, accept any appointment to or employment in any office, or shall hold or exercise, or attempt to hold or exercise, any such office or employment, he shall be deemed, and is hereby declared to be, guilty of a high misdemeanor, and, upon trial and conviction thereof, he shall be punished therefor by a fine not exceeding ten thousand dollars, or by imprisonment, etc.

Any person who shall, "contrary to the provisions of this act," accept any appointment. What are the "provisions of this act" in respect to accepting any appointment? They are found in the third section of the act putting certain offices in abeyance under the circumstances which are described in that section. If any person does accept an office which is thus put into abeyance, or any employment

or authority in respect to such office, he comes within the penal provisions of the fifth section; but outside of that there is no such thing, as accepting an office contrary to the provisions of the act, because the provisions of the act, in respect to filling offices, extend no further than to these cases; and so, in the next section, it is declared:

That every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors, etc.

Here, again, the making of a letter of authority, contrary to the provisions of the act, can refer only to those cases which the act itself has described, which the act itself has prohibited; and any other cases which are outside of such prohibition, as this case manifestly is, do not come within its provisions.

The stress of this article, however, does not seem to me to depend at all upon this question of the construction of this law, but upon a totally different matter, which I agree should be fairly and carefully considered. The important allegation of the article is that this letter of authority was given to General Thomas enabling him to perform the duties of Secretary of War *ad interim* without authority of law; that I conceive to be the main inquiry which arises under this article, provided the case of Mr. Stanton and his removal are within the Tenure-of-Office Bill at all.

I wish first to bring to the attention of the Senate the Act of 1795, which is found in 1 Statutes-at-Large, page 415. It is a short act, and I will read the whole of it:

That in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said Departments, whose appointment is not in the head thereof, whereby they cannot per-

form the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancy be filled: *Provided*, That no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.

This act, it has been suggested, may have been repealed by the Act of February 20, 1863, which is found in 12 Statutes-at-Large, page 656. This also is a short act, and I will trespass on the patience of the Senate by reading it:

That in case of the death, resignation, absence from the seat of Government, or sickness of the head of any executive Department of the Government, or of any officer of either of the said Departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize the head of any other executive Department, or other officer in either of said Departments whose appointment is vested in the President, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease: *Provided*, That no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

These acts, as the Senate will perceive, although they may be said in some sense to relate to the same general subject-matter, contain very different provisions, and the later law contains no express repeal of the other. If, therefore, the later law operates as a repeal, it is only as a repeal by implication. It says in terms that "all acts and parts of acts inconsistent with this act are hereby repealed." That a general principle of law would say if the statute did not speak those words. The addition of those words adds nothing to its repealing power. The same inquiry arises under them that would arise if they did not exist, namely, how far is this later law inconsistent with the provisions of the earlier law?

There are certain rules which I shall not fatigue the Senate by citing cases to prove, because every lawyer will recognize them as settled rules upon this subject.

In the first place there is a rule that repeals by implication are not favored by the courts. This is, as I understand it, because the courts act on the assumption or the principle that if the Legislature really intended to repeal the law they would have said so; not that they necessarily must say so, because there are repeals by implication; but the presumption is that if the Legislature entertained a clear and fixed purpose to repeal a former law they would be likely at least to have said so; and, therefore, the rule is a settled one that repeals by implication are not favored by the courts. Another rule is that the repugnancy between the two statutes must be clear. It is not enough that under some circumstances one may possibly be repugnant to the other. The repugnancy, as the language of the books is, between the two must be clear, and if the two laws can stand together the latter does not impliedly repeal the former. If Senators have any desire to recur to the authorities on this subject, they will find a sufficient number of them collected in Sedgwick on Statute Law, page 126.

Now, there is no repugnancy whatsoever between these two laws that I can perceive. The Act of 1795 applies to all vacancies, however created. The Act of 1863 applies only to vacancies, temporary or otherwise, occasioned by death and resignation; removals from office, expiration of commissions, are not included. The Act of 1795 applies only to vacancies; the Act of 1863 to temporary absences or sickness. The subject-matter, therefore, of the law is different; there is no inconsistency between them; each may stand together and operate upon the cases to which each applies; and therefore I submit that, in the strictest view which may ultimately be taken of this subject, it is not practicable to maintain that the later law here repealed alto-



gether the Act of 1795. But, whether it did or not, I state again what I have had so often occasion to repeat before, is it not a fair question, is it a crime to be on one side of that question and not on the other? Is it a high misdemeanor to believe that a certain view taken of the repeal of this earlier law by the later one is a sound view? I submit that that would be altogether too stringent a rule even for the honorable Managers themselves to contend for; and they do not, and the House of Representatives does not, contend for any such rule. Their article alleges as matter of fact that there was a willful intention on the part of the President to issue this letter to General Thomas without authority of law; not on mistaken judgment, not upon an opinion which, after due consideration, lawyers might differ about; but by reason of a willful intention to act without authority; and that, I submit, from the nature of the case, cannot be made out.

The next allegation in this article to which I desire to invite the attention of the Senate is, that the giving of this letter to General Thomas during the session of the Senate was a violation of the Constitution of the United States. That will require your attentive consideration. The Constitution, as you are well aware, has provided for two modes of filling offices. The one is by temporary commissions during the recess of the Senate, when the vacancy happens in the recess; the other is by appointment with the advice and consent of the Senate, followed by a commission from the President; but it very early became apparent to those who administered the Government that cases must occur to which neither of those modes dictated by the Constitution would be applicable, but which must be provided for; cases of temporary absence of the head of a Department the business of which, especially during the session of Congress, must, for the public interest, continue to be administered; cases of sickness, cases of resignation or removal, — for the

power of removal, at any rate in that day, was held to be in the President; cases of resignation or removal in reference to which the President was not, owing to the suddenness of the occurrence, in a condition immediately to make a nomination to fill the office, or even to issue a commission to fill the office, if such vacancy occurred in vacation; and therefore it became necessary by legislation to supply these administrative defects which existed and were not provided for by the Constitution. And accordingly, beginning in 1792, there will be found to be a series of acts on this subject of filling vacancies by temporary or *ad interim* authority; not appointments, not filling vacancies in offices by a commission in the recess of the Senate, nor by a commission signed by the President in consequence of the advice and consent of the Senate; but a mode of designating a particular person to perform temporarily the duties of some particular office which otherwise, before the office can be filled in accordance with the Constitution, would remain unperformed. These acts are one of May 8, 1792, section 8 (1 Statutes-at-Large, p. 281); February 17, 1795 (1 Statutes-at-Large, p. 415); and the last in February 20, 1863 (12 Statutes-at-Large, p. 656).

The Senate will observe what particular difficulty these laws were designed to meet. This difficulty was the occurrence of some sudden vacancy in office or some sudden inability to perform the duties of an office; and the intention of each of these laws was, each being applied to some particular class of cases, to make provision that, notwithstanding there was a vacancy in the office, or notwithstanding there was a temporary disability in the officer without a vacancy, still the duties of the office should be temporarily discharged. That was the purpose of these laws. It is entirely evident that these temporary vacancies are just as liable to occur during the session of the Senate as during the recess of the Senate; that it is just as necessary to have

a set of legislative provisions to enable the President to carry on the public service in case of these vacancies and inabilities during the session of the Senate as during the recess of Senate; and, accordingly, it will be found, by looking into these laws, that they make no distinction between the sessions of the Senate and the recesses of the Senate in reference to these temporary authorities. "Whenever a vacancy shall occur" is the language of the law — "when-ever there shall be a death or a resignation or an absence or a sickness." The law applies when the event occurs that the law contemplates as an emergency; and the particular time when it occurs is of no consequence in itself, and is deemed by the law of no consequence. In accordance with this view, Senators, has been the uniform and settled and frequent practice of the Government from its very earliest date, as I am instructed we shall prove, not in any one or two or few instances, but in great numbers of instances. That has been the practical construction put upon these laws from the time when the earliest law was passed in 1792, and it has continued down to this day.

The honorable Managers themselves read a list a few days since of temporary appointments during the session of the Senate of heads of Departments, which amounted in number, if I counted them accurately, to upward of thirty; and if you add to these the cases of officers below the heads of Departments the number will be found, of course, to be much increased; and, in the course of exhibiting this evidence, it will be found that, although the instances are not numerous, for they are not very likely to occur in practice, yet instances have occurred on all fours with the one which is now before the Senate, where there has been a removal or a suspension of an officer, sometimes one and sometimes the other, and the designation of a person has been made at the same time temporarily to discharge the duties of that office.

The Senate will see that in practice such things must

naturally occur. Take the case, for instance, of Mr. Floyd, which I alluded to yesterday. Mr. Floyd went out of office. His chief clerk was a person believed to be in sympathy with him and under his control. If the third section of the Act of 1789 was allowed to operate the control of the office went into the hands of that clerk. The Senate was in session. The public safety did not permit the War Department to be left in that predicament for one hour, if it could be avoided, and President Buchanan sent down to the Post-Office Department and brought the Postmaster-General to the War Department, and put it in his charge. There was then in this body a sufficient number of persons to look after that matter; they felt an interest in it; and consequently they passed a resolve inquiring of President Buchanan by what authority he had made an appointment of a person to take charge of the War Department without their consent, without a nomination to them, and their advising and consent to it; to which a message was sent in answer containing the facts on this subject, and showing to the Senate of that day the propriety, the necessity, and the long-continued practice under which this authority was exercised by him; and giving a schedule running through the time of General Jackson and his two immediate successors, I think, showing great numbers of *ad interim* appointments of this character, and to those, as I have said, we shall add a very considerable number of others.

I submit, then, that there can be no ground whatever for the allegation that this *ad interim* appointment was a violation of the Constitution of the United States. The legislation of Congress is a sufficient answer to that charge.

I pass, therefore, to the next article which I wish to consider, and that is not the next in number, but the eighth; and I take it in this order because the eighth article, as I have analyzed it, differs from the second only in one particular; and therefore, taking that in connection with the

second, of which I have just been speaking, it will be necessary for me to say but a very few words concerning it.

It charges an attempt unlawfully to control the appropriations made by Congress for the military service, and that is all there is in it except what is in the second article.

Upon that, certainly, at this stage of the case, I do not deem it necessary to make any observations. The Senate will remember the offer of proof on the part of the Managers, designed, as was stated, to connect the President of the United States, through his Private Secretary, with the Treasury, and thus enable him to use unlawfully appropriations made for the military service. The Senate will recollect the fate of that offer, and that the evidence was not received; and therefore it seems to me quite unnecessary to pause to comment any further upon this eighth article.

I advance to the third article, and here the allegations are, that the President appointed General Thomas; second, that he did this without the advice and consent of the Senate; third, that he did it when no vacancy had happened in the recess of the Senate; fourth, that he did it when there was no vacancy at the time of the appointment; and fifth, that he committed a high misdemeanor by thus intentionally violating the Constitution of the United States.

I desire to say a word or two upon each of these points; and first we deny that he ever appointed General Thomas to an office. An appointment can be made to an office only by the advice and consent of the Senate, and through a commission signed by the President, and bearing the great seal of the Government. That is the only mode in which the appointment can be made. The President, as I have said, may temporarily commission officers when vacancies occur during the recess of the Senate. That is not an appointment. It is not so termed in the Constitution. A clear distinction is drawn between the two. The President also may, under the Acts of 1795 and 1863, designate persons

who shall temporarily exercise the authority and perform the duties of a certain office when there is a vacancy; but that is not an appointment. The office is not filled by such a designation. Now, all which the President did was to issue a letter of authority to General Thomas, authorizing him *ad interim* to perform the duties of Secretary of War. In no sense was this an appointment.

It is said it was made without the advice and consent of the Senate. Certainly it was. How can the advice and consent of the Senate be obtained to an *ad interim* authority of this kind under any of these acts of Congress? It is not an appointment that is in view. It is to supply temporarily a defect in the administrative machinery of the Government. If he had gone to the Senate for their advice and consent, he must have gone on a nomination made by him of General Thomas to this office, a thing he never intended to do, and never made any attempt to carry into effect.

It is said no vacancy happened in the recess. That I have already considered. Temporary appointments are not limited to the temporary supply of vacancies happening in the recess of the Senate, as I have already endeavored to show.

It is said there was no vacancy at the time the act was done. That is begging the question. If Mr. Stanton's case was not within the Tenure-of-Office Act, if, as I have so often repeated, he held under the Act of 1789, and at the pleasure of the President, the moment he received that order which General Thomas carried to him there was a vacancy in point of law, however he may have refused to perform his duty and prevented a vacancy from occurring in point of fact. But the Senate will perceive these two letters were to be delivered to General Thomas at the same time. One of them is an order to Mr. Stanton to vacate the office; the other is a direction to General Thomas to take possession

when Mr. Stanton obeys the order thus given. Now, may not the President of the United States issue a letter of authority in contemplation that a vacancy is about to occur? Is he bound to take a technical view of this subject, and have the order creating the vacancy first sent and delivered, and then sit down at his table and sign the letter of authority afterward? If he expects a vacancy, if he has done an act which in his judgment is sufficient to create a vacancy, may he not, in contemplation that that vacancy is to happen, sign the necessary paper to give the temporary authority to carry on the duties of the office?

Last of all, it is said he committed a high misdemeanor by intentionally violating the Constitution of the United States when he gave General Thomas this letter of authority. If I have been successful in the argument I have already addressed to you you will be of opinion that in point of fact there was no violation of the Constitution of the United States by delivering this letter of authority, because the Constitution of the United States makes no provision on the subject of these temporary authorities, and the law of Congress has made provision equally applicable to the recess of the Senate and to its session.

Here, also, I beg leave to remind the Senate that if Mr. Stanton's case does not fall within the Tenure-of-Office Act, if the order which the President gave to him to vacate the office was a lawful order and one which he was bound to obey, everything which is contained in this article, as well as in the preceding articles, fails. It is impossible, I submit, for the honorable Managers to construct a case of an intention on the part of the President to violate the Constitution of the United States out of anything which he did in reference to the appointment of General Thomas, provided the order to Mr. Stanton was a lawful order and Mr. Stanton was bound to obey it.

I advance now, Senators, to a different class of articles,

and they may properly enough, I suppose, be called the conspiracy articles, because they rest upon charges of conspiracy between the President and General Thomas. There are four of them, the fourth, fifth, sixth, and seventh in number as they stand. The fourth and the sixth are framed under the Act of July 31, 1861, which is found in 12 Statutes-at-Large, page 284. The fifth and seventh are framed under no act of Congress. They allege an unlawful conspiracy, but they refer to no law by which the acts charged are made unlawful. The acts charged are called unlawful, but there is no law referred to and no case made by the articles within any law of the United States that is known to the President's counsel. I shall treat these articles, therefore, the fourth and sixth together, and the fifth and seventh together, because I think they belong in that order. In the first place, let me consider the fourth and sixth, which charge a conspiracy within this act which I have just mentioned. It is necessary for me to read the substance of this law in order that you may see whether it can have any possible application to this case. It was passed on the 31st of July, 1861, as a war measure, and is entitled, "An act to define and punish certain conspiracies." It provides —

That if two or more persons within any State or Territory of the United States shall conspire together to overthrow or to put down or to destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States.

These are the descriptions of the offenses. The fourth and sixth articles contain allegations that the President and



General Thomas conspired together by force, intimidation, and threats to prevent Mr. Stanton from continuing to hold the office of Secretary for the Department of War; and also that they conspired together by force to obtain possession of property belonging to the United States. These are the two articles which I suppose are designed to be drawn under this act; and these are the allegations which are intended to bring the articles within it.

Now, it does seem to me that the attempt to wrest this law to any bearing whatsoever upon this prosecution is one of the extraordinary things which the case contains. In the first place, so far from having been designed to apply to the President of the United States or to any act he might do in the course of the execution of what he believed to be his duty, it does not apply to any man or any thing within the District of Columbia at all.

If two or more persons within any State or Territory of the United States.

Not within the District of Columbia. This is a highly penal law, and an indictment found in the very words of this act charging things to have been in the District of Columbia and returned into the proper court of this District, I will undertake to say, would not bear a general demurrer, because there is locality given to those things made penal by this act of Congress. It is made applicable to certain portions of the country, but not made applicable to the District of Columbia.

But not to dwell upon that technical view of the matter, and on which we should not choose to stand, let us see what is this case. The President of the United States is of opinion that Mr. Stanton holds the office of Secretary for the Department of War at his pleasure. He thinks so, first, because he believes the case of Mr. Stanton is not provided for in the Tenure-of-Office Act, and no tenure of office is

secured to him. He thinks so, secondly, because he believes that it would be judicially decided, if the question could be raised, that a law depriving the President of the power of removing such an officer at his pleasure is not a constitutional law. He is of opinion that in this case he cannot allow this officer to continue to act as his adviser and as his agent to execute the laws if he has lawful power to remove him; and under these circumstances he gives this order to General Thomas.

I do not view this letter of authority to General Thomas as a purely military order. The service which General Thomas was invoked for is a civil service; but, at the same time, Senators will perceive that the person who gave the order is the Commander-in-Chief of the Army; that the person to whom it was given is the Adjutant-General of the Army; that the subject-matter to which the order relates is the performance of services essential to carry on the military service; and, therefore, when such an order was given by the Commander-in-Chief to the Adjutant-General respecting a subject of this kind, is it too much to say that there was invoked that spirit of military obedience which constitutes the strength of the service? Not that it was a purely military order; not that General Thomas would have been subject to a court-martial for disobeying it; but that as a faithful Adjutant-General of the Army of the United States, interested personally and professionally and patriotically to have the duties of the office of Secretary for the Department of War performed in a temporary vacancy, was it not his duty to accept the appointment, unless he saw and knew that it was unlawful to accept it? I do not know how, in fact, he personally considered it; there has been no proof given on the subject; but I have always assumed — I think Senators will assume — that when the distinguished General of the Army of the United States, on a previous occasion, accepted a similar appointment, it

was under views of propriety and duty such as those which I have now been speaking of; and how and why is there to be attributed to General Thomas, as a co-conspirator, the guilty intent of designing to overthrow the laws of his country, when a fair and just view of his conduct would leave him entirely without reproach?

And when you come, Senators, to the other co-conspirator, the President of the United States, is not the case still clearer? Make it a case of private right, if you please; put it as strongly as possible against the President in order to test the question. One of you has a claim to property; it may be a disputed claim; it is a claim which he believes may prove, when judicially examined, to be sound and good. He says to A B, "Go to C D, who is in possession of that property; I give you this order to him to give it up to you; and if he gives it up take possession." Did anybody ever imagine that that was a conspiracy? Does not every lawyer know that the moment you introduce into any transaction of this kind the element of a claim of right all criminal elements are purged at once; and that this is always true between man and man where it is a simple assertion of private right, the parties to which are at liberty either to assert them or forego them, as they please? But this was not such a case; this was a case of public right, of public duty, of public right claimed upon constitutional grounds and upon the interpretation of the law which had been given to it by the lawmakers themselves. How can the President of the United States, under such circumstances, be looked upon by anybody, whether he may or may not be guilty or not guilty of other things as a co-conspirator under this act?

These articles say that the conspiracy between the President and General Thomas was to employ force, threats, intimidation. What they have proved against the President is that he issued these orders, and that alone. Now, on the face of these orders, there is no apology for the assertion

that it was the design of the President that anybody at any time should use force, threats, or intimidation. The order is to Mr. Stanton to deliver up possession. The order to General Thomas is to receive possession from Mr. Stanton when he delivers it up. No force is assigned to him; no authority is given to him to apply for or use any force, threats, or intimidation. There is not only no express authority, but there is no implication of any authority to apply for or obtain or use anything but the order which was given him to hand to Mr. Stanton; and we shall offer proof, Senators, which we think cannot fail to be satisfactory in point of fact, that the President from the first had in view simply and solely to test this question by the law; that if this was a conspiracy it was a conspiracy to go to law, and that was the whole of it. We shall show you what advice the President received on this subject, what views in concert with his advisers he entertained, which, of course, it is not my province now to comment upon; the evidence must first be adduced, then it will be time to consider it.

The other two conspiracy articles will require very little observation from me, because they contain no new allegations of fact which are not in the fourth and sixth articles, which I have already adverted to; and the only distinction between them and the others is that they are not founded upon this conspiracy act of 1861; they simply allege an unlawful conspiracy, and leave the matter there. They do not allege sufficient facts to bring the case within the Act of 1861. In other words, they do not allege force, threats, or intimidation. I shall have occasion to remark upon these articles when I come to speak of the tenth article, because these articles, as you perceive, come within that category which the honorable Manager announced here at an early period of the trial; articles which require no law to support them; and when I come to speak of the tenth article, as I shall have occasion to discuss this subject, I wish that my

remarks, so far as they may be deemed applicable, should be applied to these fifth and seventh articles which I have thus passed over.

I shall detain the Senate but a moment upon the ninth article, which is the one relating to the conversation with General Emory. The meaning of this article, as I read it, is that the President brought General Emory before himself as Commander-in-Chief of the Army for the purpose of instructing him to disobey the law, with an intent to induce General Emory to disobey it, and with intent to enable himself unlawfully and by the use of military force through General Emory, to prevent Mr. Stanton from continuing to hold office. Now, I submit that, not only does this article fail of proof in its substance as thus detailed, but that it is disproved by the witness whom they have introduced to support it. In the first place, it appears clearly from General Emory's statement that the President did not bring him there for any purpose connected with this appropriation bill affecting the command of the Army, or the orders given to the Army. This subject General Emory introduced himself, and when the conversation was broken off it was again recurred to by himself asking the President's permission to bring it to his attention. Whatsoever was said upon that subject was said not because the President of the United States had brought the commander of the department of Washington before him for that purpose, but because, having brought him there for another purpose, to which I shall allude in a moment, the commanding General chose himself to introduce that subject and converse upon it, and obtain the President's views upon it.

In the next place, having his attention called to the act of Congress and to the order under it, the President expressed precisely the same opinion to General Emory that he had previously publicly expressed to Congress itself at the time when the act was sent to him for his signature;

and there is found set out in his answer on page 32 of the official report of these proceedings what that opinion was: that he considered that this provision interfered with his constitutional right as the Commander-in-Chief of the Army; and that is what he said to General Emory. There is not even probable cause to believe that he said it for any other than the natural reason that General Emory had introduced the subject, had asked leave to call his attention to it, and evidently expected and desired that the President should say something on the subject; and if he said anything was he not to tell the truth? That is exactly what he did say. I mean the truth as he apprehended it. It will appear in proof, as I am instructed, that the reason why the President sent for General Emory was not that he might endeavor to seduce that distinguished officer from his allegiance to the laws and the Constitution of his country, but because he wished to obtain information about military movements which he was informed upon authority which he had a right to and was bound to respect might require his personal attention.

I pass, then, from this article, as being one upon which I ought not to detain the Senate, and I come to the last one, concerning which I shall have much to say, and that is the tenth article, which is all of and concerning the speeches of the President.

In the front of this inquiry the question presents itself: What are impeachable offenses under the Constitution of the United States? Upon this question learned dissertations have been written and printed. One of them is annexed to the argument of the honorable Manager who opened the cause for the prosecution. Another one on the other side of the question, written by one of the honorable Managers themselves, may be found annexed to the proceedings in the House of Representatives upon the occasion of the first attempt to impeach the President. And there

have been others written and published by learned jurists touching this subject. I do not propose to vex the ear of the Senate with any of the precedents drawn from the Middle Ages. The framers of our Constitution were quite as familiar with them as the learned authors of these treatises, and the framers of our Constitution, as I conceive, have drawn from them the lesson which I desire the Senate to receive, that these precedents are not fit to govern their conduct on this trial.

In my apprehension, the teachings, the requirements, the prohibitions of the Constitution of the United States prove all that is necessary to be attended to for the purposes of this trial. I propose, therefore, instead of a search through the precedents which were made in the times of the Plantagenets, the Tudors, and the Stuarts, and which have been repeated since, to come nearer home and see what provisions of the Constitution of the United States bear on this question, and whether they are not sufficient to settle it. If they are it is quite immaterial what exists elsewhere.

My first position is, that when the Constitution speaks of "treason, bribery, and other high crimes and misdemeanors" it refers to, and includes only, high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done; and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment.

"Treason" and "bribery." Nobody will doubt that these are here designated high crimes and misdemeanors against the United States, made such by the laws of the United States, which the framers of the Constitution knew must be passed in the nature of the Government they were about to create, because these are offenses which strike at the existence of that Government. "Other high crimes and misdemeanors." *Noscitur a sociis*. High crimes and

misdemeanors; so high that they belong in this company with treason and bribery. That is plain on the face of the Constitution; in the very first step it takes on the subject of impeachment. "High crimes and misdemeanors" against what law? There can be no crime, there can be no misdemeanor without a law, written or unwritten, express or implied. There must be some law; otherwise there is no crime. My interpretation of it is that the language "high crimes and misdemeanors" means "offenses against the laws of the United States." Let us see if the Constitution has not said so.

The first clause of the second section of the second article of the Constitution reads thus: "The President of the United States shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." "Offenses against the United States" would include "cases of impeachment," and they might be pardoned by the President if they were not excepted. Then cases of impeachment are, according to the express declaration of the Constitution itself, cases of offenses against the United States.

Still, the learned Manager says that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Very different was the understanding of the fathers of the Constitution on this subject.

Mr. Manager BUTLER. Will you state where it was I said it was bound by no law?

Mr. STANBURY. "A law unto itself."

Mr. Manager BUTLER. "No common or statute law" was my language.

Mr. CURTIS. I desire to refer to the sixty-fourth number of the *Federalist*, which is found in Dawson's edition, on page 453:

The remaining powers which the plan of the Convention allots to the Senate, in a distinct capacity, are comprised in their partici-



pation with the Executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments, as in the business of appointments the Executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will therefore conclude this head with a view of the judicial character of the Senate.

And then it is discussed. The next position to which I desire the attention of the Senate is, that there is enough written in the Constitution to prove that this is a court in which a judicial trial is now being carried on. "The Senate of the United States shall have the sole power to try all impeachments." "When the President is tried the Chief Justice shall preside." The trial of all crimes, except in case of impeachment, shall be by jury. This, then, is the trial of a crime. You are the triers, presided over by the Chief Justice of the United States in this particular case, and that on the express words of the Constitution. There is also, according to its express words, to be an acquittal or a conviction on this trial for a crime. "No person shall be convicted without the concurrence of two thirds of the members present." There is also to be a judgment in case there shall be a conviction.

Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States.

Here, then, there is the trial of a crime, a trial by a tribunal designated by the Constitution in place of court and jury, a conviction, if guilt is proved, a judgment on that conviction, a punishment inflicted by the judgment for a crime; and this on the express terms of the Constitution itself. And yet, say the honorable Managers, there is no court to try the crime and no law by which the act is to be judged. The honorable Manager interrupted me to say that he qualified that expression of no law; his expression

was "no common or statute law." Well, when you get out of that field you are in a limbo, a vacuum, so far as law is concerned, to the best of my knowledge and belief.

I say, then, that it is impossible not to come to the conclusion that the Constitution of the United States has designated impeachable offenses as offenses against the United States, that it has provided for the trial of those offenses, that it has established a tribunal for the purpose of trying them, that it has directed the tribunal in case of conviction to pronounce a judgment upon the conviction and inflict a punishment. All this being provided for, can it be maintained that this is not a court, or that it is bound by no law?

But the argument does not rest mainly, I think, upon the provisions of the Constitution concerning impeachment. It is, at any rate, vastly strengthened by the direct prohibitions of the Constitution. "Congress shall pass no bill of attainder or *ex post facto* law." According to that prohibition of the Constitution, if every member of this body sitting in its legislative capacity and every member of the other body sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity. Yet what is claimed by the honorable Managers in behalf of members of this body? As a Congress you cannot create a law to punish these acts if no law existed at the time they were done; but sitting here as judges, not only after the fact but while the case is on trial, you may individually, each one of you, create a law by himself to govern the case.

According to this assumption the same Constitution which has made it a bill of rights of the American citizen, not only as against Congress but as against the Legislature of every State in the Union, that no *ex post facto* law shall be passed — this same Constitution has erected you into a body and empowered every one of you to say *aut inveniam*

*aut faciam viam*: if I cannot find a law I will make one. Nay, it has clothed every one of you with imperial power; it has enabled you to say, *sic volo, sic jubeo, stat pro ratione voluntas*: I am a law unto myself, by which law I shall govern this case. And, more than that, when each one of you, before he took his place here, called God to witness that he would administer impartial justice in this case according to the Constitution and the laws, he meant such laws as he might make as he went along. The Constitution, which had prohibited anybody from making such laws, he swore to observe; but he also swore to be governed by his own will; his own individual will was the law which he thus swore to observe; and this special provision of the Constitution that when the Senate sits in this capacity to try an impeachment the Senators shall be on oath means merely that they shall swear to follow their own individual wills! I respectfully submit this view cannot consistently and properly be taken of the character of this body or of the duties and powers incumbent upon it.

Look for a moment, if you please, to the other provision. This same search into the English precedents, so far from having made our ancestors who framed and adopted the Constitution in love with them, led them to put into the Constitution a positive and absolute prohibition against any bill of attainder. What is a bill of attainder? It is a case before the Parliament where the Parliament make the law for the facts they find. Each legislator (for it is in their legislative capacity they act, not in a judicial one) is, to use the phrase of the honorable Managers, "a law unto himself"; and according to his discretion, his views of what is politic or proper under the circumstances, he frames a law to meet the case and enacts it or votes in its enactment. According to the doctrine now advanced, bills of attainder are not prohibited by this Constitution; they are only slightly modified. It is only necessary for the House of

Representatives by a majority to vote an impeachment and send up certain articles and have two thirds of this body vote in favor of conviction, and there is an attainder; and it is done by the same process and depends on identically the same principles as a bill of attainder in the English Parliament. The individual wills of the legislators, instead of the conscientious discharge of the duty of the judges, settle the result.

I submit, then, Senators, that this view of the honorable Managers of the duties and powers of this body cannot be maintained. But the attempt made by the honorable Managers to obtain a conviction upon this tenth article is attended with some peculiarities which I think it is the duty of the counsel to the President to advert to. So far as regards the preceding articles, the first eight articles are framed upon allegations that the President broke a law. I suppose the honorable Managers do not intend to carry their doctrine so far as to say that unless you find the President did intentionally break a law those articles are supported. As to those articles there is some law unquestionably, the very gist of the charge being that he broke a law. You must find that the law existed; you must construe it and apply it to the case; you must find his criminal intent willfully to break the law, before the articles can be supported. But we come now to this tenth article, which depends upon no law at all, but, as I have said, is attended with some extraordinary peculiarities.

The complaint is that the President made speeches against Congress. The true statement here would be much more restricted than that; for although in those speeches the President used the word "Congress," undoubtedly he did not mean the entire constitutional body organized under the Constitution of the United States; he meant the dominant majority in Congress. Everybody so understood it; everybody must so understand it. But the complaint is

that he made speeches against those who governed in Congress. Well, who are the grand jury in this case? One of the parties spoken against. And who are the triers? The other party spoken against. One would think there was some incongruity in this; some reason for giving pause before taking any very great stride in that direction. The honorable House of Representatives sends its Managers here to take notice of what? That the House of Representatives has erected itself into a school of manners, selecting from its ranks those gentlemen whom it deems most competent by precept and example to teach decorum of speech; and they desire the judgment of this body whether the President has not been guilty of indecorum, whether he has spoken properly, to use the phrase of the honorable Manager. Now, there used to be an old-fashioned notion that although there might be a difference of taste about oral speeches, and, no doubt, always has been and always will be many such differences, there was one very important test in reference to them, and that is whether they are true or false; but it seems that in this case that is no test at all. The honorable Manager, in opening the case, finding, I suppose, that it was necessary, in some manner, to advert to that subject, has done it in terms which I will read to you:

The words are not alleged to be either false or defamatory, because it is not within the power of any man, however high his official position, in effect to slander the Congress of the United States, in the ordinary sense of that word, so as to call on Congress to answer as to the truth of the accusation.

Considering the nature of our Government, considering the experience which we have gone through on this subject, that is a pretty lofty claim. Why, if the Senate please, if you go back to the time of the Plantagenets and seek for precedents there, you will not find so lofty a claim as that. I beg leave to read from two statutes, the first being 3 Edward I, ch. 34, and the second 2 Richard II, ch. 1, a

short passage. The statute, 3 Edward I, ch. 34, after the preamble, enacts —

That from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people, or the great men of the realm; and he that doeth so shall be taken and kept in until he hath brought him into court which was the first author of the tale.

The statute 2 Richard II, c. 1, s. 5, enacted with some alterations the previous statute. It commenced thus:

Of devisors of false news and of horrible and false lies of prelates, dukes, earls, barons, and other nobles and great men of the realm; and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm.

The great men of the realm in the time of Richard II were protected only against "horrible and false lies," and when we arrive in the course of our national experience during the war with France and the administration of Mr. Adams to that attempt to check, not free speech, but free writing, Senators will find that, although it applied only to written libels, it contained an express section that the truth might be given in evidence. That was a law, as Senators know, making it penal by written libels to excite the hatred or contempt of the people against Congress among other offenses; but the estimate of the elevation of Congress above the people was not so high but that it was thought proper to allow a defense of the truth to be given in evidence. I beg leave to read from this sedition act a part of one section and make a reference to another to support the correctness of what I have said. It is found in Statutes-at-Large, page 596:

That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or

shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said Government, or either House of the said Congress, or the said President, or to bring them, or either or any of them the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, etc.

Section 3 provides —

That if any person shall be prosecuted under this act for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defense the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

In contrast with the views expressed here, I desire now to read from the fourth volume of Mr. Madison's works, pages 542 and 547, passages which, in my judgment, are as masterly as anything Mr. Madison ever wrote, upon the relations of the Congress of the United States to the people of the United States in contrast with the relations of the Government of Great Britain to the people of that island; and the necessity which the nature of our Government lays us under to preserve freedom of the press and freedom of speech:

The essential difference between the British Government and the American Constitution will place this subject in the clearest light.

In the British Government the danger of encroachments on the rights of the people is understood to be confined to the Executive Magistrate. The Representatives of the people in the Legislature are only exempt themselves from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the Executive. Hence it is a principle that the Par-

liament is unlimited in its power, or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people — such as their Magna Charta, their Bill of Rights, etc. — are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against Executive usurpations. Under such a Government as this, an exemption of the press from previous restraint, by licensers appointed by the king, is all the freedom that can be secured to it.

In the United States the case is altogether different. The people, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenses, but from the subsequent penalty of laws.

One other passage on page 547, which has an extraordinary application to the subject now before you:

1. The Constitution supposes that the President, the Congress, and each of its Houses may not discharge their trusts, either from defect of judgment or other causes. Hence they are all made responsible to their constituents at the returning periods of election; and the President, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

2. Should it happen, as the Constitution supposes it may happen, that either of these branches of the Government may not have duly discharged its trust, it is natural and proper that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

3. Whether it has, in any case, happened that the proceedings of either or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or hatred among the people,



can only be determined by a free examination thereof, and a free communication among the people thereon.

4. Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the Government, it is the duty, as well as right, of intelligent and faithful citizens to discuss and promulge them freely, as well to control them by the censorship of the public opinion as to promote a remedy according to the rules of the Constitution. And it cannot be avoided that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party.

These observations of Mr. Madison were made in respect to the freedom of the press. There were two views entertained at the time when the sedition law was passed concerning the power of Congress over this subject. The one view was that when the Constitution spoke of freedom of the press it referred to the common-law definition of that freedom. That was the view which Mr. Madison was controverting in one of the passages which I have read to you. The other view was that the common-law definition could not be deemed applicable, and that the freedom provided for by the Constitution, so far as the action of Congress was concerned, was an absolute freedom of the press. But no one ever imagined that freedom of speech, in contradistinction from written libel, could be restrained by a law of Congress; for whether you treat the prohibition in the Constitution as absolute in itself or whether you refer to the common law for a definition of its limits and meaning, the result will be the same. Under the common law no man was ever punished criminally for spoken words. If he slandered his neighbor and injured him, he must make good in damages to his neighbor the injury he had done; but there was no such thing at the common law as an indictment for spoken words. So that this prohibition in the Constitution against any legislation by Congress in restraint of the freedom of speech is necessarily an absolute prohibition; and

therefore this is a case not only where there is no law made prior to the act to punish the act, but a case where Congress is expressly prohibited from making any law to operate even on subsequent acts.

What is the law to be? Suppose it is, as the honorable Managers seem to think it should be, the sense of propriety of each Senator appealed to. What is it to be? The only rule I have heard — the only rule which can be announced — is that you may require the speaker to speak properly. Who are to be the judges whether he speaks properly? In this case the Senate of the United States on the presentation of the House of Representatives of the United States; and that is supposed to be the freedom of speech secured by this absolute prohibition of the Constitution. That is the same freedom of speech, Senators, in consequence of which thousands of men went to the scaffold under the Tudors and the Stuarts. That is the same freedom of speech which caused thousands of heads of men and of women to roll from the guillotine in France. That is the same freedom of speech which has caused in our day more than once "order to reign in Warsaw." The persons did not speak properly in the apprehension of the judges before whom they were brought. Is that the freedom of speech intended to be secured by our Constitution?

Mr. Chief Justice and Senators, I have to detain you but a very short time longer, and that is by a few observations concerning the eleventh article, and they will be very few, for the reason that the eleventh article, as I understand it, contains nothing new which needs any notice from me. It appears by the official copy of the articles which is before us, the printed copy, that this article was adopted at a later period than the preceding nine articles, and I suppose it has that appearance, that the honorable Managers, looking over the work they had already performed, perhaps not feeling perfectly satisfied to leave it in the shape in which it

then stood, came to the conclusion to add this eleventh article, and they have compounded it out of the materials which they had previously worked up into the others. In the first place, they said, here are the speeches; we will have something about them; and accordingly they begin by the allegation that the President at the Executive Mansion, on a certain occasion, made a speech, and without giving his words, but it is attributed to him that he had an intention to declare that this was not a Congress within the meaning of the Constitution; all of which is denied in his answer, and there is no proof to support it. The President, by his whole course of conduct, has shown that he could have entertained no such intention as that. He has explained that fully in his answer, and I do not think it necessary to repeat the explanation.

Then they come to the old matter of the removal of Mr. Stanton. They say he made this speech denying the competency of Congress to legislate, and following up its intent he endeavored to remove Mr. Stanton. I have sufficiently discussed that, and I shall not weary the patience of the Senate by doing so any further.

Then they say that he made this speech and followed up its intent by endeavoring to get possession of the money appropriated for the military service of the United States. I have said all I desire to say upon that.

Then they say that he made it with the intent to obstruct what is called the law "for the better government of the rebel States," passed in March, 1867, and in support of that they have offered a telegram to him from Governor Parsons and an answer to that telegram from the President, upon the subject of an amendment of the Constitution, sent in January before the March when the law came into existence, and, so far as I know, that is the only evidence which they have offered upon that subject. I leave, therefore, with these remarks, that article for the consideration of the Senate.

It must be unnecessary for me to say anything concerning the importance of this case, not only now but in the future. It must be apparent to every one, in any way connected with or concerned in this trial, that this is and will be the most conspicuous instance which ever has been or ever can be expected to be found of American justice or American injustice, of that justice which Mr. Burke says is the great standing policy of all civilized States, or of that injustice which is sure to be discovered and which makes even the wise man mad, and which, in the fixed and immutable order of God's providence, is certain to return to plague its inventors.

## 6. SPEECH IN BEHALF OF JOHN STOCKDALE

*When tried for a libel on the House of Commons. Delivered before the Court of King's Bench, December 9, 1789, by Lord Erskine.*<sup>1</sup>

MR. STOCKDALE was a London bookseller, who published a pamphlet, written by a Scottish clergyman named Logan, while the trial of Warren Hastings was going on, reflecting severely on the House of Commons for their proceedings therein. Mr. Fox, one of the managers of the impeachment, brought this publication before the House, as impugning the motives of those who had proposed the trial, and moved that the Attorney-General be directed to prosecute the author and publisher of the pamphlet for a libel on the Commons. The fact of publication was admitted, and the case, therefore, turned on the true nature of the crime alleged.

In this speech Mr. Erskine has stated, with admirable precision and force, the great principles involved in the law of libel: namely, that every composition of this kind is to be taken as a *whole*, and not judged of by detached passages; that if its general spirit and intention are good, it is not to be punished for hasty or rash expressions thrown off in the heat of discussion, and which might even amount to libels when considered by themselves; that the interests of society demand great freedom in canvassing the measures of Government; and that if a publication is decent in its language and peaceable in its import, much indulgence ought to be shown toward its author, when his real design is to discuss the subject, and not to bring contempt on the Government — though in doing so he may be led, by the strength of his feelings, to transcend the bounds of candor and propriety.

This is universally considered the finest of Mr. Erskine's speeches, "whether we regard the wonderful skill with which the argument is conducted — the soundness of the principles laid down, and their happy application to the case — the exquisite fancy with which they are embellished and illustrated — or the powerful and touching language in which they are conveyed. It is justly regarded by all English lawyers as a consummate specimen of the art of addressing a jury — as a standard, a sort of precedent for treating cases of libel, by keeping which in his eye a man may hope to succeed in special pleading his client's case

<sup>1</sup> From *Select British Eloquence*, by Chauncey A. Goodrich, D.D. (Harper and Brothers, 1874); by the kind permission of the publishers.

within its principle, who is destitute of the talent required even to comprehend the other and higher merits of his original. By these merits it is recommended to lovers of pure diction — of copious and animated description — of lively, picturesque, and fanciful illustration — of all that constitutes, if we may so speak, the poetry of eloquence" (*Edinburgh Review*, vol. xvi, p. 109). — *Goodrich*.

#### GENTLEMEN OF THE JURY:

Mr. Stockdale, who is brought as a criminal before you for the publication of this book, has, by employing me as his advocate, reposed what must appear to many an extraordinary degree of confidence; since, although he well knows that I am personally connected in friendship with most of those whose conduct and opinions are principally arraigned by its author, he nevertheless commits to my hands his defense and justification.

From a trust apparently so delicate and singular, vanity is but too apt to whisper an application to some fancied merit of one's own; but it is proper, for the honor of the English bar, that the world should know that such things happen to all of us daily, and of course; and that the defendant, without any knowledge of me, or any confidence that was personal, was only not afraid to follow up an accidental retainer, from the knowledge he has of the general character of the profession. Happy, indeed, is it for this country that, whatever interested divisions may characterize *other places*, of which I may have occasion to speak to-day, however the counsels of the highest departments of the state may be occasionally distracted by personal considerations, they never enter these walls to disturb the administration of justice. Whatever may be our public principles, or the private habits of *our* lives, they never cast even a shade across the path of our professional duties. If this be the characteristic even of the bar of an English court of justice, what sacred impartiality may not every man expect from its jurors and its bench?

As, from the indulgence which the court was yesterday pleased to give to my indisposition, this information was not proceeded on when you were attending to try it, it is probable you were not altogether inattentive to what passed at the trial of the other indictment, prosecuted also by the House of Commons. Without, therefore, a restatement of the same principles, and a similar quotation of authorities to support them, I need only remind you of the law applicable to this subject, as it was then admitted by the Attorney-General; in concession to my propositions, and confirmed by the higher authority of the court, namely, that every information or indictment must contain such a description of the crime that,

First, the defendant may know what crime it is which he is called upon to answer.

Secondly, the jury may appear to be warranted in their conclusion of guilty or not guilty.

And, thirdly, the court may see such a precise and definite transgression upon the record as to be able to apply the punishment which judicial discretion may dictate, or which positive law may inflict.

It was admitted also to follow as a mere corollary from these propositions, that where an information charges a writing to be composed or published of and concerning the Commons of Great Britain, with an intent to bring that body into scandal and disgrace with the public, the author cannot be brought within the scope of such a charge, unless the jury, on examination and comparison of the *whole matter* written or published, shall be satisfied that the particular passages charged as criminal, when explained by the context, and considered as part of one entire work, were meant and intended by the author to vilify the House of Commons as a BODY, and were written of and concerning them in PARLIAMENT ASSEMBLED.

These principles being settled, we are now to see what the present information is.

It charges that the defendant — “unlawfully, wickedly, and maliciously devising, contriving, and intending to asperse, scandalize, and vilify the Commons of Great Britain in Parliament assembled; and most wickedly and audaciously to represent their proceedings as corrupt and unjust, and to make it believed and thought as if the Commons of Great Britain in Parliament assembled were a most wicked, tyrannical, base, and corrupt set of persons, and to bring them into disgrace with the public” — the defendant published — *What?* Not those latter ends of sentences which the Attorney-General has read from his brief, as if they had followed one another in order in this book. Not those scraps and tails of passages which are patched together upon this record, and pronounced in one breath, as if they existed without intermediate matter in the same page, and without context anywhere. No! This is not the accusation, even mutilated as it is; for the information charges *that, with intention to vilify the House of Commons*, the defendant published the whole book, describing it on the record by its title: “A Review of the Principal Charges against Warren Hastings, Esq., late Governor-General of Bengal”: in which, among other things, the matter particularly selected is to be found.

Your inquiry, therefore, is not confined to this, whether the defendant published those selected parts of it; and whether, looking at them as they are distorted by the information, they carry, in fair construction, the sense and meaning which the innuendoes put upon them; but whether the author of the entire work — I say the *author*, since, if he could defend himself, the publisher unquestionably can — whether the author wrote the volume which I hold in my hand, as a free, manly, *bona-fide* disquisition of criminal charges against his fellow-citizen. Or whether the long, eloquent discussion of them, which fills so many pages, was a mere cloak and cover for the introduction of the supposed



scandal imputed to the selected passages; the mind of the writer all along being intent on traducing the House of Commons, and not on fairly answering their charges against Mr. Hastings. This, gentlemen, is the principal matter for your consideration. And therefore, if, after you shall have taken the book itself into the chamber which will be provided for you, and shall have read the whole of it with impartial attention — if, after the performance of this duty, you can return here, and with clear consciences pronounce upon your oaths that the impression made upon you by these pages is, that the author wrote them with the wicked, seditious, and corrupt intentions charged by the information — you have then my full permission to find the defendant guilty. But if, on the other hand, the general tenor of the composition shall impress you with respect for the author, and point him out to you as a man mistaken, perhaps, himself, but not seeking to deceive others — if every line of the work shall present to you an intelligent, animated mind, glowing with a Christian compassion toward a fellow-man, whom he believed to be innocent, and with a patriot zeal for the liberty of his country, which he considered as wounded through the sides of an oppressed fellow-citizen — if *this* shall be the impression on your consciences and understandings, when you are called upon to deliver your verdict — then hear from me that you not only work private injustice, but break up the press of England, and surrender her rights and liberties forever, if you convict the defendant.

Gentlemen, to enable you to form a true judgment of the meaning of this book and of the intention of its author, and to expose the miserable juggle that is played off in the information, by the combination of sentences which, in the work itself, have no bearing upon one another, I will first give you the publication as it is charged upon the record, and presented by the Attorney-General in opening the

case for the Crown; and I will then, by reading the inter-jacent matter which is studiously kept out of view, convince you of its true interpretation.

The information, beginning with the first page of the book, charges as a libel upon the House of Commons the following sentence:

The House of Commons has now given its final decision with regard to the merits and demerits of Mr. Hastings. The Grand Inquest of England have delivered their charges, and preferred their impeachment; their allegations are referred to proof; and from the appeal to the collective wisdom and justice of the nation in the supreme tribunal of the kingdom, the question comes to be determined whether Mr. Hastings be guilty or not guilty?

It is but fair, however, to admit that this first sentence, which the most ingenious malice cannot torture into a criminal construction, is charged by the information rather as introductory to what is made to follow it than as libelous in itself. For the Attorney-General, from this introductory passage in the first page, goes on at a leap to page thirteen, and reads — almost without a stop, as if it immediately followed the other — this sentence:

What credit can we give to multiplied and accumulated charges, when we find that they originate from misrepresentation and falsehood?

From these two passages thus standing together, without the intervenient matter which occupies thirteen pages, one would imagine that — instead of investigating the probability or improbability of the guilt imputed to Mr. Hastings — instead of carefully examining the charges of the Commons, and the defense of them which had been delivered before them, or which was preparing for the Lords — the author had immediately, and in a moment after stating the mere fact of the impeachment, decided that the act of the Commons originated from misrepresentation and falsehood.

Gentlemen, in the same manner a veil is cast over all that is written in the next seven pages; for, knowing that the context would help to the true construction, not only of the passages charged before, but of those in the sequel of this information, the Attorney-General, aware that it would convince every man who read it that there was no intention in the author to calumniate the House of Commons, passes over, by another leap, to page twenty; and in the same manner, without drawing his breath, and as if it directly followed the two former sentences in the first and thirteenth pages, reads from page twentieth:

An impeachment of error in judgment with regard to the quantum of a fine, and for an intention that never was executed and never known to the offending party, characterizes a tribunal of inquisition rather than a Court of Parliament.

From this passage, by another vault, he leaps over one-and-thirty pages more, to page fifty-one, where he reads the following sentence, which he mainly relies on, and upon which I shall by and by trouble you with some observations:

Thirteen of them passed in the House of Commons, not only without investigation, but without being read; and the votes were given without inquiry, argument, or conviction. A majority had determined to impeach; opposite parties met each other, and "jostled in the dark, to perplex the political drama, and bring the hero to a tragic catastrophe."

From thence, deriving new vigor from every exertion, he makes his last grand stride over forty-four pages more, almost to the end of the book, charging a sentence in the ninety-fifth page.

So that out of a volume of one hundred and ten pages, the defendant is only charged with a few scattered fragments of sentences, picked out of three or four. Out of a work consisting of about two thousand five hundred and thirty lines, of manly, spirited eloquence, only forty or fifty

lines are culled from different parts of it, and artfully put together, so as to rear up a libel, out of a false context, by a supposed connection of sentences with one another, which are not only entirely independent, but which, when compared with their antecedents, bear a totally different construction. In this manner, the greatest works upon government, the most excellent books of science, the sacred Scriptures themselves, might be distorted into libels, by forsaking the general context, and hanging a meaning upon selected parts. Thus, as in the text put by Algernon Sidney, "The fool hath said in his heart, there is no God," the Attorney-General, on the principle of the present proceeding against this pamphlet, might indict the publisher of the Bible for blasphemously denying the existence of heaven, in printing, "There is no God," for these words alone, without the context, would be selected by the information, and the Bible, like this book, would be underscored to meet it. Nor could the defendant, in such a case, have any possible defense, unless the jury were permitted to see, *by the book itself*, that the verse, instead of denying the existence of the Divinity, only imputed that imagination to a *fool*.

Gentlemen, having now gone through the Attorney-General's reading, the book shall presently come forward and speak for itself. But before I can venture to lay it before you, it is proper to call your attention to how matters stood at the time of its publication: without which the author's meaning and intention cannot possibly be understood.

The Commons of Great Britain, in Parliament assembled, had accused Mr. Hastings, as Governor-General of Bengal, of high crimes and misdemeanors; and their jurisdiction for that high purpose of national justice was unquestionably competent. But it is proper you should know the nature of this inquisitorial capacity. The Commons, in voting an impeachment, may be compared to a grand

jury finding a bill of indictment for the Crown. Neither the one nor the other can be supposed to proceed but upon the matter which is brought before them; neither of them can find guilt without accusation, nor the truth of accusation without evidence. When, therefore, we speak of the "accuser," or "accusers," of a person indicted for any crime, although the grand jury are the accusers *in form*, by giving effect to the accusation, yet, in common parlance, we do not consider *them* as the responsible authors of the prosecution. If I were to write of a most wicked indictment, found against an innocent man, which was preparing for trial, nobody who read it would conceive I meant to stigmatize the grand jury that found the bill; but it would be inquired immediately, who was the prosecutor, and who were the witnesses on the back of it? In the same manner, I mean to contend, that if this book is read with only common attention, the whole scope of it will be discovered to be this: that, in the opinion of the author, Mr. Hastings had been accused of maladministration in India, from the heat and spleen of political divisions in Parliament, and not from any zeal for national honor or justice; that the impeachment did not originate from government, but from a faction banded against it, which, by misrepresentation and violence, had fastened it on an unwilling House of Commons; that, prepossessed with this sentiment (which, however unfounded, makes no part of the present business, since the publisher is not called before you for defaming individual members of the Commons, but for a contempt of the Commons as a body), the author pursues the charges, article by article; enters into a warm and animated vindication of Mr. Hastings, by regular answers to each of them; and that, as far as the mind and soul of a man can be visible, I might almost say embodied in his writings, his intention throughout the whole volume appears to have been to charge with injustice the *private accusers* of Mr.

Hastings, and not the House of Commons as a body; which undoubtedly rather reluctantly gave way to, than heartily adopted the impeachment. This will be found to be the palpable scope of the book; and no man who can read English, and who, at the same time, will have the candor and common sense to take up his impressions from what is written in it, instead of bringing his own along with him to the reading of it, can possibly understand it otherwise.

But it may be said, admitting this to be the scope and design of the author, what right had he to canvass the merits of an accusation upon the records of the Commons, more especially while it was in the course of legal procedure? This, I confess, might have been a serious question, but the Commons, *as prosecutors of this information*, seem to have waived or forfeited their right to ask it. Before they sent the Attorney-General into this place, to punish the publication of answers to their charges, they should have recollected that their own want of circumspection in the maintenance of their privileges, and in the protection of persons accused before them, had given to the public the charges themselves, which *should* have been confined to their own journals. The course and practice of Parliament might warrant the printing of them for the use of their own members; but there the publication should have stopped, and all further progress been resisted by authority. If they were resolved to consider answers to their charges as a contempt of their privileges, and to punish the publication of them by such severe prosecutions, it would have well become them to have begun first with those printers who, by publishing the charges themselves throughout the whole kingdom, or rather throughout the whole civilized world, were anticipating the passions and judgments of the public against a subject of England upon his trial, so as to make the publication of *answers* to them not merely a privilege, but a debt and duty to humanity

and justice. The Commons of Great Britain claimed and exercised the privileges of questioning the innocence of Mr. Hastings by their impeachment: but as, however questioned, it was still to be presumed and protected, until guilt was established by a judgment, he whom they had accused had an equal claim upon their justice, to guard him from prejudice and misrepresentation until the hour of trial.

Had the Commons, therefore, by the exercise of their high, necessary, and legal privileges, kept the public aloof from all canvass of their proceedings, by an early punishment of printers, who, without reserve or secrecy, had sent out *the charges* into the world from a thousand presses in every form of publication, they would have then stood upon ground to-day from whence no argument of policy or justice could have removed them; because nothing can be more incompatible with either than appeals to the many upon subjects of judicature, which, by common consent, a few are appointed to determine, and which must be determined by facts and principles, which the multitude have neither leisure nor knowledge to investigate. But then, let it be remembered that it is for those who have the authority to accuse and punish, to set the example of, and to enforce this reserve, which is so necessary for the ends of justice. Courts of law, therefore, in England, never endure the publication of their records. A prosecutor of an indictment would be attached for such a publication; and, upon the same principle, a defendant would be punished for anticipating the justice of his country, by the publication of his defense, the public being no party to it, until the tribunal appointed for its determination be open for its decision.

Gentlemen, you have a right to take judicial notice of these matters, without the proof of them by witnesses. For jurors may not only, without evidence, found their verdicts

on facts that are notorious, but upon what they know privately themselves, after revealing it upon oath to one another. Therefore, you are always to remember that this book was written when the *charges* against Mr. Hastings, to which it is an answer, were, *to the knowledge of the Commons* (for we cannot presume our watchmen to have been asleep), publicly hawked about in every pamphlet, magazine, and newspaper in the kingdom. You well know with what a curious appetite these charges were devoured by the whole public, interesting as they were, not only from their importance, but from the merit of their composition; certainly not so intended by the honorable and excellent composer to oppress the accused, but because the commonest subjects swell into eloquence under the touch of his sublime genius. Thus, by the remissness of the Commons, who are now the prosecutors of this information, a subject of England, who was not even charged with contumacious resistance to authority, much less a proclaimed outlaw, and therefore fully entitled to every protection which the customs and statutes of the kingdom hold out for the protection of British liberty, saw himself pierced with the arrows of thousands and ten thousands of libels.

Gentlemen, before I venture to lay the book before you, it must be yet further remembered (for the fact is equally notorious) that under these inauspicious circumstances the trial of Mr. Hastings at the bar of the Lords had actually commenced long before its publication.

There the most august and striking spectacle was daily exhibited which the world ever witnessed. A vast stage of justice was erected, awful from its high authority, splendid from its illustrious dignity, venerable from the learning and wisdom of its judges, captivating and affecting from the mighty concourse of all ranks and conditions which daily flocked into it, as into a theater of pleasure. There, when the whole public mind was at once awed and softened to



the impression of every human affection, there appeared, day after day, one after another, men of the most powerful and exalted talents, eclipsing by their accusing eloquence the most boasted harangues of antiquity; rousing the pride of national resentment by the boldest invectives against broken faith and violated treaties, and shaking the bosom with alternate pity and horror by the most glowing pictures of insulted nature and humanity; ever animated and energetic, from the love of fame, which is the inherent passion of genius; firm and indefatigable, from a strong prepossession of the justice of their cause.

Gentlemen, when the author sat down to write the book now before you, all this terrible, unceasing, exhaustless artillery of warm zeal, matchless vigor of understanding, consuming and devouring eloquence, united with the highest dignity, was daily, and without prospect of conclusion, pouring forth upon one private unprotected man, who was bound to hear it, in the face of the whole people of England, with reverential submission and silence. I do not complain of this, as I did of the publication of the charges, because it is what the law allowed and sanctioned in the course of a public trial. But, when it is remembered that we are not angels, but weak, fallible men, and that even the noble judges of that high tribunal are clothed beneath their ermines with the common infirmities of man's nature, it will bring us all to a proper temper for considering the book itself, which will in a few moments be laid before you. But first, let me once more remind you, that it was under all these circumstances, and amid the blaze of passion and prejudice, which the scene I have been endeavoring faintly to describe to you might be supposed likely to produce, that the author, whose name I will now give to you, sat down to compose the book which is prosecuted to-day as a libel.

The history of it is very short and natural.

The Rev. Mr. Logan, minister of the Gospel at Leith, in

Scotland, a clergyman of the purest morals, and, as you will see by and by, of very superior talents, well acquainted with the human character, and knowing the difficulty of bringing back public opinion after it is settled on any subject, took a warm, unbought, unsolicited interest in the situation of Mr. Hastings, and determined, if possible, to arrest and suspend the public judgment concerning him. He felt for the situation of a fellow-citizen exposed to a trial which, whether right or wrong, is undoubtedly a severe one — a trial certainly not confined to a few criminal acts like those we are accustomed to, but comprehending the transactions of a whole life, and the complicated policies of numerous and distant nations — a trial which had neither visible limits to its duration,<sup>1</sup> bounds to its expense, nor circumscribed compass for the grasp of memory or understanding — a trial which had, therefore, broke loose from the common form of decision, and had become the universal topic of discussion in the world, superseding not only every other grave pursuit, but every fashionable dissipation.

Gentlemen, the question you have, therefore, to try upon all this matter is extremely simple. It is neither more nor less than this: At a time when the charges against Mr. Hastings were, by the implied consent of the Commons, in every hand and on every table — when, by their managers, the lightning of eloquence was incessantly consuming him and flashing in the eyes of the public — when every man was with perfect impunity saying, and writing, and publishing just what he pleased of the supposed plunderer and devastator of nations — would it have been criminal *in Mr. Hastings himself* to have reminded the public that he was

<sup>1</sup> The trial began 13th February, 1788, and was protracted until April 22, 1795 (occupying one hundred and forty-eight days), when Mr. Hastings was acquitted by a large majority on every separate article charged against him. The cost of the defense amounted to £76,080. — *Goodrich*.

a native of this free land, entitled to the common protection of her justice, and that he had a defense, in his turn, to offer to them, the outlines of which he implored them, in the mean time, to receive as an antidote to the unlimited and unpunished poison in circulation against him? THIS IS, without color or exaggeration, the true question you are to decide. For I assert, without the hazard of contradiction, that if Mr. Hastings himself could have stood justified or excused in your eyes for publishing this volume in his own defense, the author, if he wrote it *bona fide* to defend him, must stand equally excused and justified; and, if the author be justified, the publisher cannot be criminal, unless you have evidence that it was published by him with a different spirit and intention from those in which it was written. The question, therefore, is correctly what I just now stated it to be: Could *Mr. Hastings* have been condemned to infamy for writing this book?

Gentlemen, I tremble with indignation, to be driven to put such a question in England. Shall it be endured that a subject of this country (instead of being arraigned and tried for some single act in her ordinary courts, where the accusation, as soon, at least, as it is made public, is followed within a few hours by the decision) may be impeached by the Commons for the transactions of twenty years — that the accusation shall spread as wide as the region of letters — that the accused shall stand, day after day, and year after year, as a spectacle before the public, which shall be kept in a perpetual state of inflammation against him; yet that he shall not, without the severest penalties, be permitted to submit anything to the judgment of mankind in his defense? If this be law (which it is for you to-day to decide), such a man has NO TRIAL! That great hall, built by our fathers for English justice, is no longer a court, but an altar; and an Englishman, instead of being judged in it by GOD AND HIS COUNTRY, IS A VICTIM AND A SACRIFICE!

You will carefully remember that I am not presuming to question either the right or duty of the Commons of Great Britain to impeach; neither am I arraigning the propriety of their selecting, as they have done, the most extraordinary persons for ability which the age has produced, to manage their impeachment. Much less am I censuring the managers themselves, charged with the conduct of it before the Lords, who are undoubtedly bound, by their duty to the House and to the public, to expatiate upon the crimes of the persons whom they had accused. None of these points are questioned by me, nor are in this place questionable. I only desire to have it decided whether, if the Commons, when national expediency happens to call in their judgment for an impeachment, shall, instead of keeping it on their own records and carrying it with due solemnity to the Peers for trial, permit it, without censure and punishment, to be sold like a common newspaper in the shop of my client, so crowded with their own members that no plain man, without privilege of Parliament, can hope even for a sight of the fire in the winter's day, every man buying it, reading it, and commenting upon it — the gentleman himself who is the object of it, or his friend in his absence, may not, without stepping beyond the bounds of English freedom, put a copy of what is thus published into his pocket, and send back to the very same shop for publication a *bona-fide*, rational, able answer to it, in order that the bane and antidote may circulate together, and the public be kept straight till the day of decision. If you think, gentlemen, that this common duty of self-preservation to the accused himself, which nature writes as a law upon the hearts of even savages and brutes, is nevertheless too high a privilege to be enjoyed by an impeached and suffering Englishman; or if you think it beyond the offices of humanity and justice, when brought home to the hand of a brother or a friend, you will say so by your verdict of

guilty; the decision will then be *yours*; and the consolation *mine*, that I have labored to avert it. A very small part of the misery which will follow from it is likely to light upon *me*; the rest will be divided among *yourselves and your children*.

Gentlemen, I observe plainly and with infinite satisfaction, that you are shocked and offended at my even supposing it possible you should pronounce such a detestable judgment; and that you only require of me to make out to your satisfaction, as I promised, that the real scope and object of this book is a *bona-fide* defense of Mr. Hastings, and not a cloak and cover for scandal on the House of Commons. I engage to do this, and I engage for nothing more. I shall make an open, manly defense. I mean to torture no expressions from their natural constructions, to dispute no innuendoes on the record, should any of them have a fair application; nor to conceal from your notice any unguarded, intemperate expressions, which may, perhaps, be found to checker the vigorous and animated career of the work. Such a conduct might, by accident, shelter the defendant; but it would be the surrender of the very principle on which alone the liberty of the English press can stand; and I shall never defend any man from a temporary imprisonment by the permanent loss of my own liberty, and the ruin of my country. I mean, therefore, to submit to you that, though you should find a few lines in page thirteen or twenty-one; a few more in page fifty-one, and some others in other places; containing expressions bearing on the House of Commons, even as a body, which, if written as independent paragraphs by themselves, would be indefensible libels, yet, that you have a right to pass them over in judgment, provided the substance clearly appears to be a *bona-fide* conclusion, arising from the honest investigation of a subject which it was lawful to investigate, and the questionable expressions, the visible effusion of a

zealous temper, engaged in an honorable and legal pursuit. After this preparation, I am not afraid to lay the book in its genuine state before you.

The pamphlet begins thus:

The House of Commons has now given its final decision with regard to the merits and demerits of Mr. Hastings. The Grand Inquest of England have delivered their charges, and preferred their impeachment; their allegations are referred to proof; and, from the appeal to the collective wisdom and justice of the nation in the supreme tribunal of the kingdom, the question comes to be determined, whether Mr. Hastings be guilty or not guilty.

Now if, immediately after what I have just read to you — which is the first part charged by the information — the author had said, “Will accusations, built on such a baseless fabric, prepossess the public in favor of the impeachment? What credit can we give to multiplied and accumulated charges, when we find that they originate from misrepresentation and falsehood?” every man would have been justified in pronouncing that he was attacking the House of Commons; because the groundless accusations mentioned in the second sentence could have no reference but to the House itself mentioned by name in the first and only sentence which preceded it.

But, gentlemen, to your astonishment I will now read *what intervenes* between these two passages. From this you will see, beyond a possibility of doubt, that the author never meant to calumniate the House of Commons, but to say that the accusations of Mr. Hastings before the whole House grew out of a Committee of Secrecy established some years before, and were afterward brought forward by the spleen of private enemies and a faction in the Government. This will appear not only from the grammatical construction of the words, but from what is better than words, from the meaning which a person writing as a friend of Mr. Hastings must be supposed to have intended to

convey. Why should such a friend attack the House of Commons? Will any man gravely tell me that the House of Commons, *as a body*, ever wished to impeach Mr. Hastings? Do we not all know that they constantly hung back from it, and hardly knew where they were, or what to do when they found themselves entangled with it? My learned friend, the Attorney-General, is a member of this Assembly: perhaps he may tell you by and by what HE thought of it, and whether he ever marked any disposition in the majority of the Commons hostile to Mr. Hastings. But why should I distress my friend by the question? The fact is sufficiently notorious; and what I am going to read from the book itself — which is left out in the information — is too plain for controversy.

Whatever may be the event of the impeachment, the proper exercise of such power is a valuable privilege of the British Constitution, a formidable guardian of the public liberty and the dignity of the nation. *The only danger is, that, from the influence of faction, and the awe which is annexed to great names, they may be prompted to determine before they inquire, and to pronounce judgment without examination.*

Here is the clue to the whole pamphlet. The author trusts to, and respects, the House of Commons, but is afraid their mature and just examination may be disturbed by *faction*. Now, does he mean government by *faction*? Does he mean the majority of the Commons by *faction*? Will the House, which is the prosecutor here, sanction that application of the phrase? or will the Attorney-General admit the majority to be the true innuendo of *faction*? I wish he would; I should then have gained something at least by this extraordinary debate. But I have no expectation of the sort; such a concession would be too great a sacrifice to any prosecution, at a time when everything is considered as *faction* that disturbs the repose of the minister in Parliament. But, indeed, gentlemen, some things

are too plain for argument. The author certainly means *my* friends, who, whatever qualifications may belong to them, must be contented with the appellation of *faction*, while they oppose the minister in the House of Commons; but the House, having given this meaning to the phrase of *faction* for its own purposes, cannot in decency change the interpretation, in order to convict my client. I take that to be beyond the privilege of Parliament.

The same bearing upon individual members of the Commons, *and not on the Commons as a body*, is obvious throughout. Thus, after saying, in page ninth, that the East India Company had thanked Mr. Hastings for his meritorious services — which is unquestionably true — he adds, “that mankind would abide by their deliberate decision, rather than by the intemperate assertion of a *committee*.”

This he writes after the impeachment was found by the Commons at large. But he takes no account of their proceedings; imputing the whole to the original committee — that is, the *Committee of Secrecy* — so called, I suppose, from their being the authors of twenty volumes in folio, which will remain a secret to all posterity, as nobody will ever read them. The same construction is equally plain from what immediately follows:

The report of the *Committee of Secrecy* also states that the happiness of the native inhabitants of India has been deeply affected, their confidence in English faith and lenity shaken and impaired, and the character of this nation wantonly and wickedly degraded.

Here, again, you are grossly misled by the omission of nearly twenty-one pages. For the author, though he is here speaking of this committee *by name*, which brought forward the charges to the notice of the House, and which he continues to do onward to the next selected paragraph, yet, by arbitrarily sinking the whole context, is taken to be speaking to the House as a *body*, when, in the passage



next charged by the information, he reproaches the *accusers* of Mr. Hastings; although, so far is he from considering them as the House of Commons, that in the very same page he speaks of the articles as the charges not even of the committee, but of Mr. Burke alone, the most active and intelligent member of that body, having been circulated in India by a relation of that gentleman:

The charges of Mr. Burke have been carried to Calcutta, and carefully circulated in India.

Now, if we were considering these passages of the work as calumniating a body of gentlemen, many of whom I must be supposed highly to respect, or as reflecting upon my worthy friend whose name I have mentioned, it would give rise to a totally different inquiry, which it is neither my duty nor yours to agitate. But, surely, the more that consideration obtrudes itself upon us, the more clearly it demonstrates that the author's whole direction was against the individual accusers of Mr. Hastings, and not against the House of Commons, which merely trusted to the matter they had collected.

Although, from a caution which my situation dictates, as representing another, I have thought it my duty thus to point out to you the real intention of the author, as it appears by the fair construction of the work, yet I protest, that in my own apprehension it is very immaterial whether he speaks of the committee or of the House, provided you shall think the whole volume a *bona-fide* defense of Mr. Hastings. This is the great point I am, by all my observations, endeavoring to establish, and which, I think, no man who reads the following short passages can doubt. Very intelligent persons have, indeed, considered them, if founded in facts, to render every other amplification unnecessary. The first of them is as follows:

It was known at that time that Mr. Hastings had not only

descended from a public to a private station, but that he was persecuted with accusations and impeachments. But none of these *suffering millions* have sent their complaints to this country; not a sigh nor a groan has been wafted from India to Britain. On the contrary, testimonies the most honorable to the character and merit of Mr. Hastings have been transmitted by those very princes whom he has been supposed to have loaded with the deepest injuries.

Here, gentlemen, we must be permitted to pause together a little; for, in examining whether these pages were written as an honest answer to the charges of the Commons, or as a prostituted defense of a notorious criminal, whom the writer believed to be guilty, truth becomes material at every step. For, if, in any instance, he be detected of a willful misrepresentation, he is no longer an object of your attention.

Will the Attorney-General proceed, then, to detect the hypocrisy of our author, by giving us some details of the *proofs* by which these personal enormities have been established, and which the writer must be supposed to have been acquainted with? I ask this as the defender of Mr. Stockdale, not of Mr. Hastings, with whom I have no concern. I am sorry, indeed, to be so often obliged to repeat this protest; but I really feel myself embarrassed with those repeated coincidences of defense which thicken on me as I advance, and which were, no doubt, overlooked by the Commons when they directed this interlocutory inquiry into his conduct. I ask, then, as counsel for Mr. Stockdale, whether, when a great state criminal is brought for justice at an immense expense to the public, accused of the most oppressive cruelties, and charged with the robbery of princes and the destruction of nations, is it not open to any one to ask, Who are his accusers? What are the sources and the authorities of these shocking complaints? Where are the Ambassadors or memorials of those princes whose revenues he has plundered? Where are the witnesses for

those unhappy men in whose persons the rights of humanity have been violated? How deeply buried is the blood of the innocent, that it does not rise up in retributive judgment to confound the guilty! These, surely, are questions which, when a fellow-citizen is upon a long, painful, and expensive trial, humanity has a right to propose; which the plain sense of the most unlettered man may be expected to dictate, and which all history must provoke from the more enlightened. When CICERO impeached VERRES<sup>1</sup> before the great tribunal of Rome, of similar cruelties and depredations in *her* provinces, the Roman people were not left to such inquiries. All Sicily surrounded the Forum, demanding justice upon her plunderer and spoiler, with tears and imprecations. It was not by the eloquence of the orator, but by the cries and tears of the miserable, that Cicero prevailed in that illustrious cause. Verres fled from the oaths of his accusers and their witnesses, and not from the voice of Tully. To preserve the fame of his eloquence, he composed his five celebrated speeches, but they were never delivered against the criminal, because he had fled from the city, appalled with the sight of the persecuted and the oppressed. It may be said that the cases of Sicily and India are widely different; perhaps they may be; whether they are or not, is foreign to my purpose. I am not bound to deny the possibility of answers to such questions; I am only vindicating *the right to ask them*.

Gentlemen, the author, in the other passage which I marked out to your attention, goes on thus:

Lord Cornwallis and Sir John Macpherson, his successors in office, have given the same voluntary tribute of approbation to his

<sup>1</sup> Verres, as prætor and governor of Sicily, was guilty of such extortion and oppression, that the Sicilian people brought an accusation against him in the Senate, and Cicero conducted the impeachment. Verres was defended by Hortensius, the celebrated Roman orator; but, aware of the justice of the accusation, he left Rome without waiting the result.—*Goodrich*.

measures as Governor-General of India. A letter from the former, dated the 10th of August, 1786, gives the following account of our dominions in Asia: "The native inhabitants of this kingdom are the happiest and best protected subjects in India; our native allies and tributaries confide in our protection; the country powers are aspiring to the friendship of the English; and from the King of Tidore, toward New Guinea, to Timur Shah, on the banks of the Indus, there is not a state that has not *lately* given us proofs of confidence and respect."

Still pursuing the same test of sincerity, let us examine this defensive allegation.

Will the Attorney-General say that he does not believe such a letter from Lord Cornwallis ever existed? No: for he knows that it is as authentic as any document from India upon the table of the House of Commons. What, then, is the letter? "The native inhabitants of this kingdom, says Lord Cornwallis [writing from the very spot], are the happiest and best protected subjects in India," etc., etc., etc. The inhabitants of *this kingdom!* Of *what kingdom?* Of the very kingdom which Mr. Hastings has just returned from governing for thirteen years, and for the misgovernment and desolation of which he stands every day as a criminal, or, rather, as a spectacle, before us. This is matter for serious reflection, and fully entitles the author to put the question which immediately follows:

Does this authentic account of the administration of Mr. Hastings, and of the state of India, correspond with the gloomy picture of despotism and despair drawn by the *Committee of Secrecy*?

Had that picture been even drawn by the House of Commons itself, he would have been fully justified in asking this question; but you observe it has no bearing on it; the last words not only entirely destroy that interpretation, but also the meaning of the very next passage, which is selected by the information as criminal, namely:

What credit can we give to multiplied and accumulated charges, when we find that they originate from misrepresentation and falsehood?

This passage, which is charged as a libel on the Commons, when thus compared with its immediate antecedent, can bear but one construction. It is impossible to contend that it charges misrepresentation on the House that found the impeachment, but upon the *Committee of Secrecy* just before adverted to, who were supposed to have selected the matter, and brought it before the whole House for judgment.

I do not mean, as I have often told you, to vindicate any calumny on that honorable committee, or upon any individual of it, any more than upon the Commons at large; BUT THE DEFENDANT IS NOT CHARGED BY THIS INFORMATION WITH ANY SUCH OFFENSES.

Let me here pause once more to ask you, whether the book in its genuine state, as far as we have advanced in it, makes the same impression on your minds now as when it was first read to you in detached passages; and whether, if I were to tear off the first part of it which I hold in my hand, and give it to you as an entire work, the first and last passages, which have been selected as libels on the Commons, would now appear to be so, when blended with the interjacent parts? I do not ask your answer; I shall have it in your verdict. The question is only put to direct your attention in pursuing the remainder of the volume to this main point — IS IT AN HONEST, SERIOUS DEFENSE? For this purpose, and as an example for all others, I will read the author's entire answer to the first article of charge concerning Cheyte Sing, the Zemindar of Benares, and leave it to your impartial judgments to determine whether it be a mere cloak and cover for the slander imputed by the information to the concluding sentence of it, which is the only part attacked; or whether, on the contrary, that con-

clusion itself, when embodied with what goes before it, does not stand explained and justified?

The first article of impeachment [continues our author] is concerning Cheyte Sing, the Zemindar of Benares. Bulwart Sing, the father of this Rajah, was merely an *aumil*, or farmer and collector of the revenues for Sujah ul Dowlah, Nabob of Oude, and Vizier of the Mogul Empire. When, on the decease of his father, Cheyte Sing was confirmed in the office of collector for the Vizier, he paid £200,000 as a gift, or *nuzzeranah*, and an additional rent of £30,000 per annum.

As the father was no more than an *aumil* [agent], the son succeeded only to his rights and pretensions. But by a *sunnud* [decree] granted to him by the Nabob Sujah Dowlah in September, 1773, through the influence of Mr. Hastings, he acquired a legal title to property in the land, and was raised from the office of *aumil* to the rank of Zemindar. About four years after the death of Bulwart Sing, the Governor-General and council of Bengal obtained the sovereignty paramount of the province of Benares. On the transfer of this sovereignty the governor and council proposed a new grant to Cheyte Sing, confirming his former privileges, and conferring upon him the addition of the sovereign rights of the Mint, and the powers of criminal justice with regard to life and death. He was then recognized by the Company as one of their Zemindars: a tributary subject, or feudatory vassal, of the British Empire in Hindostan. The feudal system, which was formerly supposed to be peculiar to our Gothic ancestors, has always prevailed in the East. In every description of that form of government, notwithstanding accidental variations, there are two associations expressed or understood: one for internal security, the other for external defense. The King or Nabob confers protection on the feudatory baron as tributary prince, on condition of an annual revenue in the time of peace, and of military service, partly commutable for money, in the time of war. The feudal incidents in the Middle Ages in Europe, the fine paid to the superior on *marriage*, *wardship*, *relief*, etc., correspond to the annual tribute in Asia. Military service in war, and extraordinary aids in the event of extraordinary emergencies, were common to both.

When the Governor-General of Bengal, in 1778, made an extraordinary demand on the Zemindar of Benares for five lacks of rupees, the British Empire, in that part of the world, was surrounded with enemies which threatened its destruction. In 1779,

a general confederacy was formed among the great powers of Hindostan for the expulsion of the English from their Asiatic dominions. At this crisis the expectation of a French armament augmented the general calamities of the country. Mr. Hastings is charged by the committee with making his first demand under the false pretense that hostilities had commenced with France. Such an insidious attempt to pervert a meritorious action into a crime is new, even in the history of impeachments. On the 7th of July, 1778, Mr. Hastings received private intelligence from an English merchant at Cairo, that war had been declared by Great Britain on the 23d of March, and by France on the 30th of April. Upon this intelligence, considered as authentic, it was determined to attack all the French settlements in India. The information was afterward found to be premature; but in the latter end of August a secret dispatch was received from England, authorizing and appointing Mr. Hastings to take the measures which he had already adopted in the preceding month. The Directors and the Board of Control have expressed their approbation of this transaction by liberally rewarding Mr. Baldwyn, the merchant, for sending the earliest intelligence he could procure to Bengal. It was two days after Mr. Hastings's information of the French war that he formed the resolution of exacting the five lacks of rupees from Cheyte Sing, and would have made similar exactions from all the dependencies of the Company in India, had they been in the same circumstances. The fact is, that the great Zemindars of Bengal pay as much to Government as their lands can afford. Cheyte Sing's collections were above fifty lacks, and his rent not twenty-four.

The right of calling for extraordinary aids and military service in times of danger being universally established in India, as it was formerly in Europe during the feudal times, the subsequent conduct of Mr. Hastings is explained and vindicated. The Governor-General and Council of Bengal having made a demand upon a tributary Zemindar for three successive years, and that demand having been resisted by their vassal, they are justified in his punishment. The necessities of the Company, in consequence of the critical situation of their affairs in 1781, calling for a high fine — the ability of the Zemindar, who possessed near two

crores of rupees in money and jewels, to pay the sum required — his backwardness to comply with the demands of his superiors — his disaffection to the English interest, and desire of revolt, which even then began to appear, and were afterward conspicuous, fully justify Mr. Hastings in every subsequent step of his conduct. In the whole of his proceedings, it is manifest that he had not early formed a design hostile to the Zemindar, but was regulated by events which he could neither foresee nor control. When the necessary measures which he had taken for supporting the authority of the Company, by punishing a refractory vassal, were thwarted and defeated by the barbarous massacre of the British troops, and the rebellion of Cheyte Sing, the appeal was made to arms, an unavoidable revolution took place in Benares, and the Zemindar became the author of his own destruction.

Here follows the concluding passage, which is arraigned by the information :

The decision of the House of Commons on this charge against Mr. Hastings is one of the most singular to be met with in the annals of Parliament. The minister, who was followed by the majority, vindicated him in everything that he had done, and found him blamable only for what he intended to do; justified every step of his conduct, and only criminated his proposed intention of converting the crimes of the Zemindar to the benefit of the state, by a fine of fifty lacks of rupees. An impeachment of error in judgment with regard to the *quantum* of a fine, and for an intention that never was executed, and never known to the offending party, characterizes a tribunal of *inquisition* rather than a court of Parliament.

Gentlemen, I am ready to admit that this sentiment might have been expressed in language more reserved and guarded; but you will look to the sentiment itself, rather than to its dress — to the mind of the writer, and not to the bluntness with which he may happen to express it. It is obviously the language of a warm man, engaged in the hon-



est defense of his friend, and who is brought to what he thinks a just conclusion in argument, which, perhaps, becomes offensive in proportion to its truth. Truth is undoubtedly no warrant for writing what is reproachful of any private man. If a member of society lives within the law, then, if he offends, it is against God alone, and man has nothing to do with him; and, if he transgress the laws, the libeler should arraign him before them, instead of presuming to try him himself. But as to writings on *general subjects*, which are not charged as an infringement on the rights of individuals, but as of a seditious tendency, it is far otherwise. When, in the progress either of legislation or of high national justice in Parliament, they who are amenable to no law are supposed to have adopted, through mistake or error, a principle which, if drawn into precedent, might be dangerous to the public, I shall not admit it to be a libel in the course of a legal and *bona-fide* publication, to state that such a principle had *in fact* been adopted. The people of England are not to be kept in the dark touching the proceedings of their own representatives. Let us, therefore, coolly examine this supposed offense, and see what it amounts to.

First, was not the conduct of the right honorable gentleman, whose name is here mentioned, exactly what it is represented? Will the Attorney-General, who was present in the House of Commons, say that it was not? Did not the minister vindicate Mr. Hastings in what he *had done*,<sup>1</sup> and was not his consent to that article of the impeachment founded on the *intention only* of levying a fine on the Zemindar for the service of the state, beyond the quantum which he, the minister, thought reasonable? What else is this but an impeachment of error in judgment in the quantum of a fine?

<sup>1</sup> Mr. Pitt expressed his opinion that, admitting the right of Mr. Hastings to tax the Zemindar, his general conduct in the business had been unnecessarily severe. — *Goodrich*.

So much for the first part of the sentence, which, regarding Mr. Pitt only, is foreign to our purpose. And as to the last part of it, which imputes the sentiments of the minister to the majority that followed him with their votes on the question, that appears to me to be giving handsome credit to the majority for having voted from conviction, and not from courtesy to the minister. To have supposed otherwise, I dare not say, would have been a more *natural* libel, but it would certainly have been a greater one. The sum and substance, therefore, of the paragraph is only this — that an impeachment for an error in judgment is not consistent with the theory or the practice of the English Government. So say I. I say, without reserve, speaking merely in the abstract, and not meaning to decide upon the merits of Mr. Hastings's cause, that an impeachment for an error in judgment is contrary to the whole spirit of English criminal justice, which, though not binding on the House of Commons, ought to be a guide to its proceedings. I say that the extraordinary jurisdiction of impeachment ought never to be assumed to expose error or to scourge misfortune, but to hold up a terrible example to corruption and *willful* abuse of authority by extra legal pains. If public men are always punished with due severity when the source of their misconduct appears to have been selfishly corrupt and criminal, the public can never suffer when their errors are treated with gentleness. From such protection to the magistrate, no man can think lightly of the charge of magistracy itself, when he sees, by the language of the saving judgment, that the only title to it is an honest and zealous intention. If at this moment, gentlemen, or indeed in any other in the whole course of our history, the people of England were to call upon every man in this impeaching House of Commons who had given his voice on public questions, or acted in authority, civil or military, to answer for the issues of our councils and our wars, and if

honest single intentions for the public service were refused as answers to impeachments, we should have many relations to mourn for, and many friends to deplore. For my own part, gentlemen, I feel, I hope, for my country as much as any man that inhabits it; but I would rather see it fall, and be buried in its ruins, than lend my voice to wound any minister, or other responsible person, however unfortunate, who had fairly followed the lights of his understanding and the dictates of his conscience for their preservation.

Gentlemen, this is no theory of mine; it is the language of English law, and the protection which it affords to every man in office, from the highest to the lowest trust of government. In no one instance that can be named, foreign or domestic, did the Court of King's Bench ever interpose its extraordinary jurisdiction, by information, against any magistrate for the widest departure from the rule of his duty, without *the plainest and clearest proof of corruption*. To every such application, not so supported, the constant answer has been, Go to a grand jury with your complaint. God forbid that a magistrate should suffer from an error in judgment, if his purpose was honestly to discharge his trust. We cannot stop the ordinary course of justice; but wherever the court has a discretion, such a magistrate is entitled to its protection. I appeal to the noble judge, and to every man who hears me, for the truth and universality of this position. And it would be a strange solecism, indeed, to assert that, in a case where the supreme court of criminal justice in the nation would refuse to interpose an extraordinary though a legal jurisdiction, on the principle that the ordinary execution of the laws should never be exceeded, but for the punishment of malignant guilt, the Commons, in their higher capacity, growing out of the same Constitution, should reject that principle, and stretch them still further by a jurisdiction still more eccentric.

Many impeachments have taken place, because the law *could not* adequately punish the objects of them; but who ever heard of one being set on foot because the law, upon principle, *would not* punish them? Many impeachments have been adopted for a *higher* example than a prosecution in the ordinary courts, but surely never for a *different* example. The matter, therefore, in the offensive paragraph is not only an indisputable truth, but a truth in the propagation of which we are all deeply concerned.

Whether Mr. Hastings, in the particular instance, acted from corruption or from zeal for his employers, is what I have nothing to do with; it is to be decided in judgment; my duty stops with wishing him, as I do, an honorable deliverance. Whether the minister or the Commons meant to found this article of the impeachment on mere error, without corruption, is likewise foreign to the purpose. The author could only judge from what was said and done on the occasion. He only sought to guard the principle, which is a common interest, and the rights of Mr. Hastings under it. He was, therefore, justified in publishing that an impeachment, founded in error in judgment, was, to all intents and purposes, illegal, unconstitutional, and unjust.

Gentlemen, it is now time for us to return again to the work under examination. The author, having discussed the whole of the first article through so many pages, without even the imputation of an incorrect or intemperate expression, except in the concluding passage (the meaning of which I trust I have explained), goes on with the same earnest disposition to the discussion of the second charge, respecting the princesses of Oude, which occupies *eighteen* pages, not one syllable of which the Attorney-General has read, and on which there is not even a glance at the House of Commons. The whole of this answer is, indeed, so far from being a mere cloak for the introduction of slander, that I aver it to be one of the most masterly pieces of writing

I ever read in my life. From thence he goes on to the charge of contracts and salaries, which occupies *five* pages more, in which there is not a glance at the House of Commons, nor a word read by the Attorney-General. He afterward defends Mr. Hastings against the charges respecting the opium contracts. Not a glance at the House of Commons; not a word by the Attorney-General. And, in short, in this manner he goes on with the others, to the end of the book.

Now, is it possible for any human being to believe that a man, having no other intention than to vilify the House of Commons (as this information charges), should yet keep his mind thus fixed and settled as the needle to the pole, upon the serious merits of Mr. Hastings's defense, without ever straying into matter even questionable, except in the two or three selected parts out of two or three hundred pages? This is a forbearance which could not have existed, if calumny and detraction had been the malignant objects which led him to the inquiry and publication. The whole fallacy, therefore, arises from holding up to view a few detached passages, and carefully concealing the general tenor of the book.

Having now finished most, if not all of these *critical* observations, which it has been my duty to make upon this unfair mode of prosecution, it is but a tribute of common justice to the Attorney-General, (and which my personal regard for him makes it more pleasant to pay,) that none of my commentaries reflect in the most distant manner upon him; nor upon the Solicitor for the Crown, who sits near me, who is a person of the most correct honor; far from it. The Attorney-General having orders to prosecute, in consequence of the address of the House to His Majesty, had no choice in the mode — no means at all of keeping the prosecutors before you in countenance, but by the course which has been pursued. But so far has he been from enlisting into the cause those prejudices, which it is not difficult

to slide into a business originating from such exalted authority, he has honorably guarded you against them; pressing, indeed, severely upon my client with the weight of his ability, but not with the glare and trappings of his high office.

Gentlemen, I wish that my strength would enable me to convince you of the author's singleness of intention, and of the merit and ability of his work, by reading the whole that remains of it. But my voice is already nearly exhausted; I am sorry my client should be a sufferer by my infirmity. One passage, however, is too striking and important to be passed over; the rest I must trust to your private examination. The author having discussed all the charges, article by article, sums them all up with this striking appeal to his readers:

The authentic statement of facts which has been given, and the arguments which have been employed, are, I think, sufficient to vindicate the character and conduct of Mr. Hastings, even on the maxims of European policy. When he was appointed Governor-General of Bengal, he was invested with a discretionary power to promote the interests of the India Company, and of the British Empire in that quarter of the globe. The general instructions sent to him from his constituents were, "*That in all your deliberations and resolutions, you make the safety and prosperity of Bengal your principal object, and fix your attention on the security of the possessions and revenues of the Company.*" His superior genius sometimes acted in the spirit, rather than complied with the letter of the law; but he discharged the trust, and preserved the empire committed to his care, in the same way, and with greater splendor and success than any of his predecessors in office; his departure from India was marked with the lamentations of the natives and the gratitude of his countrymen; and, on his return to England, he received the cordial congratulations of that numerous and respectable society, whose interests he had promoted, and whose dominions he had protected and extended.

Gentlemen of the jury — if this be a willfully false account of the instructions given to Mr. Hastings for his

Government, and of his conduct under them, the author and publisher of this defense deserves the severest punishment, for a mercenary imposition on the public. But if it be true that he was directed to make the *safety and prosperity of Bengal the first object of his attention*, and that, under his administration, it has been safe and prosperous; if it be true that the security and preservation of our possessions and revenues in Asia were marked out to him as the great leading principle of his Government, and that those possessions and revenues, amid unexampled dangers, *have* been secured and preserved, then a question may be unaccountably mixed with your consideration, much beyond the consequence of the present prosecution, involving, perhaps, the merit of the impeachment itself which gave it birth — a question which the Commons, as prosecutors of Mr. Hastings, should, in common prudence, have avoided; unless, regretting the unwieldy length of their proceedings against him, they wish to afford him the opportunity of this strange anomalous defense. For, although I am neither his counsel, nor desire to have anything to do with his guilt or innocence; yet, in the collateral defense of my client, I am driven to state matter which may be considered by many as hostile to the impeachment. For if our dependencies have been secured, and their interests promoted, I am driven, in the defense of my client, to remark that it is mad and preposterous to bring to the standard of justice and humanity the exercise of a dominion founded upon violence and terror. It *may* and *must* be true that Mr. Hastings has repeatedly offended against the rights and privileges of Asiatic government, if he was the faithful deputy of a power which could not maintain itself for an hour without trampling upon both. He may and must have offended against the laws of God and nature, if he was the faithful viceroy of an empire wrested in blood from the people to whom God and nature had given it. He may and

must have preserved that unjust dominion over timorous and abject nations by a terrifying, overbearing, insulting superiority, if he was the faithful administrator of your Government, which, having no root in consent or affection — no foundation in similarity of interests — no support from any one principle which cements men together in society, could only be upheld by alternate stratagem and force. The unhappy people of India, feeble and effeminate as they are from the softness of their climate, and subdued and broken as they have been by the knavery and strength of civilization, still occasionally start up in all the vigor and intelligence of insulted nature. To be governed at all, they must be governed with a rod of iron; and our empire in the East would, long since, have been lost to Great Britain, if civil skill and military prowess had not united their efforts to support an authority — which Heaven never gave — by means which it never can sanction.<sup>1</sup>

Gentlemen, I think I can observe that you are touched with this way of considering the subject, and I can account for it. I have not been considering it through the cold medium of books, but have been speaking of man and his nature, and of human dominion, from what I have seen of them myself among reluctant nations submitting to our authority. I know what they feel, and how such feelings can

<sup>1</sup> Mr. Hastings was unquestionably guilty of nearly all the acts charged upon him by Mr. Burke. Still it was felt by the court, and at last by the public at large, that great allowance ought to be made for him when it was remembered that he completely restored the finances of the country, which he found in the utmost disorder; that he established the British Empire in India on a firm basis, at a time when, under a less energetic government than his own, it would inevitably have fallen altogether; and, in addition to this, he was constantly pressed by the Directors of the East India Company for remittances of money, which could only be extorted by oppression. Although his government was arbitrary, yet it was popular among the natives, being milder and more just than that of their own princes; while he himself was respected for the unusual regard which he paid to native prejudices and customs, and his patronage of literature and the fine arts. — *Goodrich*.



alone be repressed. I have heard them in my youth from a naked savage, in the indignant character of a prince surrounded by his subjects, addressing the governor of a British colony, holding a bundle of sticks in his hand, as the notes of his unlettered eloquence. "Who is it," said the jealous ruler over the desert, encroached upon by the restless foot of English adventure — "who is it that causes this river to rise in the high mountains, and to empty itself into the ocean? Who is it that causes to blow the loud winds of winter, and that calms them again in summer? Who is it that rears up the shade of those lofty forests, and blasts them with the quick lightning at his pleasure? The same Being who gave to you a country on the other side of the waters, and gave ours to us; and by this title we will defend it," said the warrior, throwing down his tomahawk upon the ground, and raising the war-sound of his nation. These are the feelings of subjugated man all round the globe; and, depend upon it, nothing but fear will control where it is vain to look for affection.

These reflections are the only antidotes to those anathemas of superhuman eloquence which have lately shaken these walls that surround us, but which it unaccountably falls to my province, whether I will or no, a little to stem the torrent of, by reminding you that you have a mighty sway in Asia, which cannot be maintained by the finer sympathies of life, or the practice of its charities and affections. What will *they* do for you when surrounded by two hundred thousand men with artillery, cavalry, and elephants, calling upon you for their dominions which you have robbed them of? Justice may, no doubt, in such a case forbid the levying of a fine to pay a revolting soldiery; a treaty may stand in the way of increasing a tribute to keep up the very existence of the Government; and delicacy for women may forbid all entrance into a Zenana for money, whatever may be the necessity for taking it. All these things must

ever be occurring. But, under the pressure of such constant difficulties, so dangerous to national honor, it might be better, perhaps, to think of effectually securing it altogether, by recalling our troops and our merchants, and abandoning our Oriental empire. Until this be done, neither religion nor philosophy can be pressed very far into the aid of reformation and punishment. If England, from a lust of ambition and dominion, will insist on maintaining despotic rule over distant and hostile nations, beyond all comparison more numerous and extended than herself, and gives commission to her viceroys to govern them with no other instructions than to preserve them, and to secure permanently their revenues, with what color of consistency or reason can she place herself in the moral chair, and affect to be shocked at the execution of her own orders; adverting to the exact measure of wickedness and injustice necessary to their execution, and complaining only of *the excess* as the immorality, considering her authority as a dispensation for breaking the commands of God, and the breach of them as only punishable when contrary to the ordinances of man?

Such a proceeding, gentlemen, begets serious reflection. It would be better, perhaps, for the masters and the servants of all such governments to join in supplication, that the great Author of violated humanity may not confound them together in one common judgment.

Gentlemen, I find, as I said before, I have not sufficient strength to go on with the remaining parts of the book. I hope, however, that notwithstanding my omissions, you are now completely satisfied that, whatever errors or misconceptions may have misled the writer of these pages, the justification of a person whom he believed to be innocent, and whose accusers had themselves appealed to the public, was the single object of his contemplation. If I have succeeded in that object, every purpose which I had in addressing you has been answered.

It only now remains to remind you that another consideration has been strongly pressed upon you, and, no doubt, will be insisted on in reply. You will be told that the matters which I have been justifying as legal, and even meritorious, have therefore not been made the subject of complaint; and that, whatever intrinsic merit parts of the book may be supposed or even admitted to possess, such merit can afford no justification to the selected passages, some of which, even with the context, carry the meaning charged by the information, and which are indecent animadversions on authority. To this I would answer (still protesting as I do against the application of any one of the innuendoes) that, if you are firmly persuaded of the singleness and purity of the author's intentions, you are not bound to subject him to infamy, because, in the zealous career of a just and animated composition, he happens to have tripped with his pen into an intemperate expression in one or two instances of a long work. If this severe duty were binding on your consciences, the liberty of the press would be an empty sound, and no man could venture to write on any subject, however pure his purpose, without an attorney at one elbow and a counsel at the other.

From minds thus subdued by the terrors of punishment, there could issue no works of genius to expand the empire of human reason, nor any masterly compositions on the general nature of government, by the help of which the great commonwealths of mankind have founded their establishments; much less any of those useful applications of them to critical conjunctures, by which, from time to time, our own Constitution, by the exertion of patriot citizens, has been brought back to its standard. Under such terrors, all the great lights of science and civilization must be extinguished; for men cannot communicate their free thoughts to one another with a lash held over their heads. It is the nature of everything that is great and useful, both

in the animate and inanimate world, to be wild and irregular, and we must be contented to take them with the alloys which belong to them, or live without them. Genius breaks from the fetters of criticism, but its wanderings are sanctioned by its majesty and wisdom when it advances in its path: subject it to the critic, and you tame it into dullness. Mighty rivers break down their banks in the winter, sweeping away to death the flocks which are fattened on the soil that they fertilize in the summer: the few may be saved by embankments from drowning, but the flock must perish for hunger. Tempests occasionally shake our dwellings and dissipate our commerce; but they scourge before them the lazy elements, which without them would stagnate into pestilence.<sup>1</sup> In like manner, Liberty herself, the last and best gift of God to his creatures, must be taken just as she is: you might pare her down into bashful regularity, and shape her into a perfect model of severe, scrupulous law, but she would then be Liberty no longer; and you must be content to die under the lash of this inexorable justice which you had exchanged for the banners of Freedom.

If it be asked where the line to this indulgence and impunity is to be drawn, the answer is easy. The liberty of the press, *on general subjects*, comprehends and implies as much strict observance of positive law as is consistent with perfect purity of intention, and equal and useful society, What that latitude is, cannot be promulgated in the ab-

<sup>1</sup> This is one of the finest amplifications in English oratory, beautiful in itself, justified by the importance of the subject which it enforces, and admirably suited to produce the designed impression. The seminal idea was probably suggested by a remark of Burke, whose writings Mr. Erskine incessantly studied: "*It is the nature of all greatness not to be exact.*" We see in this case, how a man of genius may borrow from another, without detracting in the least from the freshness and originality with which his ideas are expressed and applied. At the present day, there can be very little of that originality which presents an idea *for the first time*. All that can be expected is, that we *make it our own*, and apply it to new purposes. — Goodrich.

stract, but must be judged of in the particular instance, and consequently, upon this occasion, must be judged of by you, without forming any possible precedent for any other case; and where can the judgment be possibly so safe as with the members of that society which alone can suffer, if the writing is calculated to do mischief to the public? You must, therefore, try the book by that criterion, and say whether the publication was premature and offensive, or, in other words, whether the publisher is bound to have suppressed it until the public ear was anticipated and abused, and every avenue to the human heart or understanding secured and blocked up. I see around me those by whom, by and by, Mr. Hastings will be most ably and eloquently defended;<sup>1</sup> but I am sorry to remind my friends that, but for the right of suspending the public judgment concerning him till their season of exertion comes round, the tongues of angels would be insufficient for the task.

Gentlemen, I hope I have now performed my duty to my client: I sincerely hope that I have; for, certainly, if ever there was a man pulled the other way by his interests and affections — if ever there was a man who should have trembled at the situation in which I have been placed on this occasion, it is myself, who not only love, honor, and respect, but whose future hopes and preferments are linked, from free choice, with those who, from the mistakes of the author, are treated with great severity and injustice. These are strong retardments; but I have been urged on to activity by considerations which can never be inconsistent with honorable attachments, either in the political or social world — the love of justice and of liberty, and a zeal for the Constitution of my country, which is the inheritance of our posterity, of the public, and of the world.

<sup>1</sup> Mr. Law (afterward Lord Ellenborough), Mr. Plumer, and Mr. Dallas. — *Goodrich*.

These are the motives which have animated me in defense of this person, who is an entire stranger to me — whose shop I never go to — and the author of whose publication, as well as Mr. Hastings, who is the object of it, I never spoke to in my life.

One word more, gentlemen, and I have done. Every human tribunal ought to take care to administer justice, as we look hereafter to have justice administered to ourselves. Upon the principle on which the Attorney-General prays sentence upon my client — God have mercy upon us! Instead of standing before Him in judgment with the hopes and consolations of Christians, we must call upon the mountains to cover us; for which of us can present, for omniscient examination, a pure, unspotted, and faultless course? But I humbly expect that the benevolent Author of our being will judge us as I have been pointing out for your example. Holding up the great volume of our lives in his hands, and regarding the general scope of them; if He discovers benevolence, charity, and good-will to man beating in the heart, where He alone can look; if He finds that our conduct, though often forced out of the path by our infirmities, has been in general well directed; his all-searching eye will assuredly never pursue us into those little corners of our lives, much less will his justice select them for punishment, without the general context of our existence, by which faults may be sometimes found to have grown out of virtues, and very many of our heaviest offenses to have been grafted by human imperfection upon the best and kindest of our affections. No, gentlemen, believe me, this is not the course of divine justice, or there is no truth in the Gospels of Heaven. If the general tenor of a man's conduct be such as I have represented it, he may walk through the shadow of death, with all his faults about him, with as much cheerfulness as in the common paths of life; because he knows that, instead of a stern accuser to

expose before the Author of his nature those frail passages which, like the scored matter in the book before you, checker the volume of the brightest and best-spent life, his mercy will obscure them from the eye of his purity, and our repentance blot them out forever.

All this would, I admit, be perfectly foreign and irrelevant, if you were sitting here in a case of property between man and man, where a strict rule of law must operate, or there would be an end of civil life and society. It would be equally foreign, and still more irrelevant, if applied to those shameful attacks upon private reputation which are the bane and disgrace of the press; by which whole families have been rendered unhappy during life, by aspersions, cruel, scandalous, and unjust. Let such libelers remember that no one of my principles of defense can, at any time or upon any occasion, ever apply to shield THEM from punishment; because such conduct is not only an infringement of the rights of men, as they are defined by strict law, but is absolutely incompatible with honor, honesty, or mistaken good intention. On such men let the Attorney-General bring forth all the artillery of his office, and the thanks and blessings of the whole public will follow him. But this is a totally different case. Whatever private calumny may mark this work, it has not been made the subject of complaint, and we have therefore nothing to do with that, nor any right to consider it. We are trying whether the public could have been considered as offended and endangered if Mr. Hastings himself, in whose place the author and publisher have a right to put themselves, had, under all the circumstances which have been considered, composed and published the volume under examination. That question cannot, in common sense, be anything resembling a question of LAW, but is a pure question of FACT, to be decided on the principles which I have humbly recommended. I, therefore, ask of the court that the book itself may now be

delivered to you. Read it with attention, and, as you shall find it, pronounce your verdict.

This trial took place before the passing of Mr. Fox's Libel Bill; and Lord Kenyon charged the jury that they were not to consider whether the pamphlet was libelous, but simply whether it had been published by the defendant. Under these circumstances, they spent two hours in deliberation, but finally broke through the instructions of the court, and found the defendant NOT GUILTY, thus anticipating the rights soon after secured to juries by an act of Parliament.



## 7. THE UTILITY OF PRAYER

*A Discourse by the Reverend Charles Reynolds Brown, D.D.,  
Dean of the Yale Divinity School*<sup>1</sup>

THIS discourse is presented as an admirable example of orderly and well-analyzed homiletic writing.

THE moment we believe in God we are face to face with a strong presumption in favor of the utility of prayer. If He is the Almighty, He can hear. If He is a moral being, He will make reply. This argument was suggested by the psalmist of old, "He that planted the ear, shall he not hear? He that formed the eye, shall he not see?" The man who believes that God is and that He is a God of character, by that faith affirms his further confidence that "He is a rewarder of them that diligently seek Him."

Prayer, reduced to its simplest terms, is the natural, affectionate intercourse between a father and his children. The Gospels assert that

these two mysterious beings, man and God, have such a kinship between them that their relationship to each other can in no other way be so well named as by the terms "father" and "child." This conception makes room for that infinite distance between God and man which so profoundly impresses all whose minds dwell upon the subject. Between the man of power, knowledge and wide range of interest, and the infant whose face is breaking into its first intelligent smile, the distance is well-nigh immeasurable, though it in no way destroys the genuineness of the kinship between them. Toward the Infinite Father our path is to be trodden in the same way the child treads the path toward equality with the human parent.<sup>2</sup>

The method of prayer is not found in the action of criminals entreating a judge for mercy, or of courtiers beseeching their king for favors, or of adepts seeking to manipulate

<sup>1</sup> From *The Main Points*; by the kind permission of The Pilgrim Press.

<sup>2</sup> John P. Coyle, *The Imperial Christ*, p. 74.

certain mysterious forces in the world for personal ends. It is found in the form and the spirit of family life. "When ye pray, say, 'Our Father.'" Prayer is the act of a child entering into companionship with his Father. Prayer is thus natural and rational. The man who never speaks to his Father is morbid! If you, with all your imperfections, love to have your children come to you; if they are benefited by coming; if you give them bread and fish, instruction and help, affection and companionship, when they come, how much more will your heavenly Father give good things to them that ask Him!

The definite promises of Scripture encourage the habit of prayer. The Bible speaks of the moral needs and privileges of men with accuracy and authority. Its words about prayer are clear and confident. It never seems to be feeling its way. It walks with firm tread, as in the light of ascertained facts. "Men ought always to pray." "Ask, and ye shall receive." "Seek, and ye shall find." "Knock," — if you desire to advance where the way seems closed, — "and it shall be opened unto you." The utility of prayer is steadily assumed.

Two familiar passages illustrate what perseverance will accomplish in the face of unfavorable conditions. A selfish man was in bed at midnight, angrily unwilling to be disturbed, but because his neighbor persisted in knocking, the crabbed fellow arose and gave him bread to set before those guests who had overtaken him with an empty larder. An unjust judge, who neither feared God nor man, was so moved by the persistence of a poor widow — a type of helplessness in a corrupt court of law — that simply through dread of being wearied by her continual coming, he gave her justice. These are arguments *e contrario*. If perseverance in the face of such adverse conditions gains its end, how much more will persevering prayer secure its object when directed to the benevolent Father! These are sam-

ples of the many confident assurances the Scriptures offer us regarding the efficacy of honest prayer.

A further encouragement to our faith in the efficacy of prayer arises from the example of Jesus. Even those who refuse assent to the claim that he was the Son of God regard him as the best man that ever lived — in fact, a perfect man. It is significant that this perfect man was preëminently a man of prayer. Humanity at its best prays. The Son of Man, whose moral achievements have never been surpassed, spent whole nights in prayer. His habit of prayer was so manifestly helpful that his disciples came to him and said, "Lord, teach us to pray." We have no record of their saying, "Lord, teach us to heal," or, "Teach us to preach." They saw that his power to heal, and to speak as never man spake, sprang from his sense of vital fellowship with the Father, sustained by prayer. They asked, therefore, that they might be taught to pray.

Jesus left one prayer so beautiful, so comprehensive, so satisfying to the human heart, that it is being repeated this very day in more than three hundred languages by prayerful men. When the representatives of all religions met in a parliament at the World's Fair in Chicago, the "Lord's Prayer" was by universal consent adopted as the form of petition for the opening of the sessions. Jews and Gentiles, Cretes and Arabians, Buddhists and Christians, Moham-medans and Hindus, all spoke to the Father through those simple words, as in a language to which they were born.

Jesus, the author of this universal prayer, made the most confident promises as to the efficacy of prayer. He saw life whole, and with clear-eyed intelligence he set his seal upon the noble utility of prayer. The whole life of this perfect man was bathed in prayer. He prayed even when his enemies were unjustly putting him to death. The disciple cannot do better than be as his Lord. When men grow so wise that they do not pray, scoffing at the idea of

prayer accomplishing anything, we may well compare their moral intelligence and spiritual effectiveness with that of Jesus; and then recall the fact that his confidence in prayer never wavered.

Another strong presumption in favor of the value of prayer arises when we turn to the long, broad lines of human experience. The scientific way of reaching the truth is not to sit down and reason out in advance what ought to be the fact, what is possible or probable in this great world of which we know so little; the scientific method is to go and see. Human beings have always had the habit of prayer. There have been cities without walls, without schools, without markets, without books, without many things that we ordinarily associate with city life, but never a city without its places of prayer. Prayer is the persistent, incurable habit of the race.

The fact that it is thus widespread and has endured through all the centuries indicates that it has utility. When we find a fin on a fish, a wing on a bird, an "instinct" in an animal, the fact that it is there indicates that it is useful — it would not otherwise have been retained. Useless organs disappear or become rudimentary. Unless prayer sustains some vital relation to man's well-being it would not have thus endured. The fact that the race always has prayed and the fact that a greater volume of intelligent prayer is being offered in this twentieth century than ever before raise a strong presumption that such an exercise of one's powers is rational and useful.

In the face of this persistent habit of mankind, it is instructive to recall the testimony of a distinguished evolutionist that in Nature we have found it to be true that

everywhere the internal adjustment has been brought about so as to harmonize with some actually existing external fact. The eye was developed in response to the outward existence of radiant light, the ear in response to the outward existence of acoustic

vibrations, the mother's love came in response to the infant's needs. If the relation established in the morning twilight of man's existence between the human soul and a world invisible and immaterial is a relation of which only the subjective term is real and the objective term is non-existent, then, I say, it is something utterly without precedent in the whole history of creation.

If the capacity of man for fellowship with God through prayer were real only at our end of the line and unreal at the other, then it is an utter break in the whole method discovered in the ascertained uniformities of Nature.

The lesson of evolution, therefore, is that through all these weary ages the human soul has not been cherishing in religion a delusive phantom, but, in spite of seemingly endless groping and stumbling, it has been rising to the recognition of its essential kinship with the ever-living God.<sup>1</sup>

And what has been the broadly ascertained result of this widespread and long-continued effort to realize kinship with God through prayer? The cumulative answer comes back from multitudes of praying men — hearts have been renewed, affections purified, wills strengthened, aspirations lifted; great and gracious answers of peace have come; added security and confidence have been enjoyed. We need not turn to those exceptional and surprising "answers to prayer" sometimes collected into books of anecdote. Curious coincidences have sometimes been urged as foundation-stones for confidences in the efficacy of prayer. Fortunate occurrences have been overworked in the supposed interests of a conquering faith. In this consideration I would ground my faith in prayer rather upon the broad and ordinary lines, where there are uninterrupted answers coming back to men as they pray. The spiritual results of the habit of honest prayer are so well ascertained as to lend strong aid in lifting this exercise into the place of dignity and the region of high confidence where it belongs.

<sup>1</sup> John Fiske, *Through Nature to God*, pp. 189, 191.

These four presumptions, then, taken from the natural implications of our belief in God, from the confident promises of those writings which contain Supreme Court decisions and form the common law of spiritual life, from the habit and the teaching of Jesus, and from long lines of human experience, must have weight in determining any one's attitude toward prayer.

Two objections to prayer on rational grounds are made, — one from a scientific and the other from a philosophical point of view. The claim is made that an answer to prayer would involve the interruption of the established order; it would mean, therefore, a violation of law. In the presence of the unbending constancy of the physical system which surrounds us, impressing the average man with its moral indifference, prayer seems like an irrational proceeding. It appears to some minds as the act of a puny being urging upon the Omnipotent that the great through traffic of the world be side-tracked in order to give his local train the right of way.

The other objection is to the effect that, if God is wise and good, He will do what is best for us, and for every one, without our asking — indeed, to ask Him for anything implies a certain solicitude as to his appropriate action. "Your heavenly Father knoweth that ye have need of all these things." Then why should we ask? It is an impertinence in that it calls upon Him to change his line of action in obedience to our suggestion. All the lesser questions which arise are really comprehended within these two fundamental ones.

In regard to the first, that an answer to prayer involves the violation of law, we sometimes frighten ourselves unnecessarily by writing the word "Law" with a capital letter, and then imagining that it is "a kind of second-hand deity of itself," never to be interfered with by any one in heaven or on earth. All this is purely verbal. "Natural

law" is simply a phrase to indicate the regular, orderly habits of the Creator who is above all and in all things. We have noted some of his cosmic habits as being regular and we call them "laws." But God is not bound by them. He has not tied his own hands by certain of his own habits. On the whole, He apparently deems it best to observe them regularly, that his creatures may depend upon his activity in certain matters — the rising of the sun, the return of the seasons, the growth of seed, the bodily conditions of health and disease — with solid certainty. These habits are wise and good or He would not have adopted them. But to fancy that He will not and cannot vary his action; to imagine, for instance, that He could not reinforce and quicken that energy which we lightly call "the healing process of nature" in the case of the sick; to deny his power to help by some unusual movement of his silent energy for the relief of one of his children in an emergency, would be to make Him less than God.

Praying people are sometimes unnecessarily frightened by a pretentious phrase — "the uniformity of nature." There is such a thing, but no one knows enough to define it. No one would undertake to name all "the laws of nature." The interrelation of spiritual forces with physical forces is but dimly understood. We are feeling our way toward an understanding of the total "uniformity of nature" which includes all such interaction, but that perfect knowledge is at present too high for us; we cannot attain unto it. It is therefore dogmatic assumption to claim that the few things we have learned about "natural law" entirely block the way and make it impossible for God to answer the prayers of his children.

These scientific laws, which are often held up as bogies to frighten the children of the Father out of their confidence in Him, are simply the best we know thus far about some manifestations of an Eternal Energy. The truly scientific

man does not undertake to say what may or may not be possible in realms where his knowledge is confessedly incomplete. He does not deny the possibility of miracles, or the possibility of answers to prayer — it is purely a matter of evidence as to what does actually occur.

This must be so in the nature of the case. We have been surprised so many times that possibly we may be surprised again. There are more things in this world than men have dreamed of, and more things wrought by prayer than hasty philosophies allow. Men were saying fifty years ago that it was scientifically impossible to run a heavy street-car through the streets, loaded with a hundred people, heated, lighted, and moved by a current of electricity from a single wire. They said it was scientifically impossible to talk from New York to Chicago and have the familiar tones of a friend's voice recognized, or to transmit by electricity a signature preserving its well-known individuality. They said it was scientifically impossible to telegraph with accuracy for hundreds of miles across the open sea without wires. They said that the present phenomena of hypnotism and healing by suggestion, recognized by scientific men as beyond a peradventure, were scientifically impossible. In all these and in many other cases they were mistaken in their presuppositions. We are constantly learning more about the subtle, invisible forces in this world. We are not prepared offhand to decide upon what is or what is not impossible, or to pass upon the claims that many of the earth's wisest and best men have made regarding prayer, without painstaking investigation.

When I begin to pray for my own physical health, for the recovery of some sick friend, for success in my undertakings, for moral peace and strength, or for any legitimate object, I set in motion new forces. They begin to act not in violation of law, but in accordance with a higher law; they introduce a new element to be reckoned with. The man



drawing water out of a well, where the force of gravitation would cause the water to remain, is not violating a universal law, he is bringing to bear another force which alters what would have been the natural position of the water. Human energy and volition are constantly playing into the great natural order, realizing purposes which would not have been realized if the system had been left to itself. The man who prays puts in operation a kind of energy, invisible as electricity or as the atmospheric waves which make possible wireless telegraphy, or as the force that acts in the influence of thought upon digestion, but just as real. Prayer is the act of a man bringing up his need by a moral act and linking it with the offered help of God. This brings to bear upon the situation a new force.

When we thus stand amazed, on the one hand, at the results accomplished by certain invisible forces with which we are slowly becoming acquainted, and when we turn on the other hand to the confident words of a Master in the kingdom of the spirit, we are not disturbed in our faith by these would-be scientific objections as to the efficacy of prayer.

A man standing in his noblest attitude before God, turning the whole of his inner life Godward, bending the full energy of will and affection toward the attainment of some holy end, is wielding a force not easily estimated. As President Eliot of Harvard said, "Prayer is the transcendent effort of human intelligence." Jesus did not use scientific language; he used popular language, but he made this point clear — for moral ends, for the purpose of rich spiritual development, God has within his keeping certain great aids which are only obtainable by that noble exercise of the highest faculties which we call prayer.

We are in no wise disturbed by the fact that we have not reduced the possibilities of this prayer force, acting within the larger uniformities of God, to an exact science. We

have not reduced to an exact science the influence of a mother's love upon her children, or the effect of a good name upon one's prospect of success, or the physical benefits of a cheerful habit of mind. We have not reduced to an exact science the forces at work in a wheat-field — they are too intricate for our present knowledge. Perfect intelligence would know how many grains in each bushel would sprout and grow, but no man can tell. Perfect intelligence could indicate why certain prayers are answered and why some are not, but such complete understanding of all the forces to be considered is not within our reach. But even though in all these fields our knowledge stops far short of completeness, enough is known to encourage the effort — mothers love their children; a right-minded man guards his good name; sensible people promote health by good cheer. Farmers sow in the confidence that they will reap; and thoughtful people keep on praying, assured by the promises of Christ and by an ever-increasing volume of religious experience, that prayer works its own beneficent results.

The other objection raises the question as to why a wise and good God should withhold action until we ask. How can we indeed ask Him to vary what must already have been perfect action!

Such *a priori* objections might be carried into other fields as well. Why does a good God withhold from his children a wheat harvest until they have ploughed and sowed and reaped? Why does God hide away treasures of gold in the hills, locking it up in quartz, scattering its grains through the clay and sand, covering it with mountains? He does it because toil is good for men. It would have been a doubtful kindness to lay these values in heaps ready to man's hand. All things have been done and are being done now for the moral education of the race. In all that God does, whether in the renewal of the spiritual life, or in healing the body, or in ordering the seasons, He has in mind the

moral improvement of his people. Benefits are conditioned upon appropriate effort because of the moral ends which are thereby served. Blessings wait upon our asking, because men nowhere receive more effective moral education than in waiting upon God in prayer. The soul never stands in such dignity of privilege, never asserts its richest prerogative so fully as when, standing face to face with its Maker, it talks with Him of the things that belong to its peace.

This is a strange objection to prayer! Why does a wise and good God, knowing our needs, require us to come and ask Him before He grants his help? That is to say, why does He not proceed to do what is best, leaving us free to spend our time with some one else, instead of spending it with Him?

The objection vanishes the moment we remember that all things are ordered with reference to strengthening the moral bond between the Father and his children. If any one of you is a father, why do you love to have your children come to you, talk over their affairs with you, ask you for what they want, sometimes wisely and sometimes unwisely? You know that their coming and the consequent reinforcement of the bond between you and them is not only a joy to you, it is for the lasting advantage of the children. Thus a wise and good God, for the same sacred ends, withholds certain blessings until his children obediently and lovingly come to Him in prayer.

It is an unspeakable loss for children never to have known the companionship of the earthly father and mother. It is a greater loss for a man never to know, through heart to heart communion, the companionship of a heavenly Father. Therefore, because of the incompleteness of our moral nurture without this experience, God has made certain benefits, temporal as well as spiritual, conditional upon our coming to Him in prayer. He has ordained this method

of securing blessings untold, that we may be attracted and encouraged to know Him whom to know is life eternal.

Prayer will bear the scientific and the philosophic test, and its realities can be stated in the language of the schools. Yet the simple, familiar language Jesus used puts it more clearly and effectively. As a boy you did not stand outside your father's door when you were conscious of some need which he could supply. You did not tarry, reasoning, in metaphysical fashion, that if your father were wise and good he would do what was best; or that any suggested deviation would be a violation of the family order which must be right since he established it. You went in and asked. It was better for you to ask, even though your requests lacked wisdom. The eight-year-old boy who asked for a shotgun did not get it, but he received something better than a shotgun through that hour of companionship with his father. Except ye become as little children in your method of procedure, ye shall in no wise enter into the deeper meaning of prayer.

Practical men have sometimes turned away from prayer as a thing well enough for women and children, but having no attraction for clear-headed men of affairs. But they in the stress of this workaday world, feel the need of something to lift their lives to a higher plane of thought and action. They need to know Him whom the wisest of men called "the Father." If they would go in, not troubling themselves about the particular range of their requests, not embarrassing themselves by scientific and metaphysical questions that once seemed to block the way, but becoming as little children speaking to their father, the philosophy of prayer would be cleared of its difficulties by blessed personal experience.

Two things ought ever to be borne in mind: the chief object of prayer is not to get something. The claim has been made that if we have faith we can get anything we

want. Jesus had faith. He prayed, "Let this cup pass from me." It did not pass. He drank it next day upon the cross. But he continued in prayer until he could say, "If I must drink it, not my will, but thine, be done." The purpose of prayer is not to enable a man to stand before God and say, "Not as thou wilt, but as I will." Its deeper purpose is to bring him into that harmony with God, where he will say, "Thy will be done."

That of itself is a mighty answer. What better thing could come than that he should be made able to say to the Perfect One, "Thy will be done"? This would not mean mere passive acquiescence in the inevitable. It would imply conscious self-devotement to the will of God. Jesus prayed until he could say, "Thy will be done." He then added "Rise, let us be going," as he went forth to do the Father's will. The prayer that brings us into voluntary harmony with the divine purpose has in that very fact achieved a gracious answer.

We are not intent upon having our own way in every situation, nor do we suppose that such a result would be for our highest good. God has not resigned the management of the world into the hands of his fumbling children, whether they stand or kneel. It would be a strange family where the will of the children ruled the home. Many a prayer fails to bring the specific thing sought. "The prayer of faith shall save the sick," yet the writer knew there would come a last sickness when each would die, even though prayer for his recovery might be offered. "The effectual fervent prayer of a righteous man availeth *much*" — much, but not everything which imperfect knowledge might ask.

The universe is not a democracy where the people rule, even though their wishes be expressed in prayer. It is a kingdom where God rules in a fatherly way over the lives of his growing but immature children. It would be a calam-

ity if every ignorant prayer were answered; if the world were wholly managed by our wishes rather than by his higher wisdom. The chief purpose of prayer throughout is not that of getting our will done, but the enjoyment of that richer privilege of being with the Father, and of being brought into active harmony with his holy will.

Jesus looked ahead to the time when the clamorous, insistent type of prayer, intent upon its own ends, would pass. He reminded us that men are not heard for their much speaking. He said, "In that day ye shall ask me nothing." The petitionary element would be overshadowed by the sense of holy companionship. When you are praying you are in the highest company possible. The fact that you are there in conscious fellowship with the heavenly Father is a rich reward for your act. "Hours are well spent when they are spent with Him."

When you fail of obtaining some specific request it does not destroy your faith in prayer, nor incline you to cease. The eight-year-old boy who failed of the shotgun did not stop associating with his father. The parent who in pleading for a child's life looked up defiantly, silently vowing that if the child died she would never pray again, thought better of it; she saw that such an attitude was not in the spirit of prayer. She gratefully recalled the fact that a higher wisdom controls all things, and that, whatever the issue, she enjoyed an unspeakable advantage in that she was brought by her prayer into closer fellowship with the Father.

The other consideration is that prayer is not a mere intellectual exercise or an effort of the will; prayer is ethical and must be the act of the entire nature. It is the "effectual fervent prayer" of a righteous man that "availeth much." The assurance is given to "the rightened man who is in line with the laws under which he makes his experiments."

“When ye pray, say, ‘Our Father.’” We ask as his children. We make our requests with filial freedom and confidence, but they proceed from a filial nature. We stand in reverent, obedient trust before Him in uttering even the first two words of genuine prayer. We must find our places in his house, at his table, in his service, as obedient children, before the total nature can look up and say, “Our Father.” Even the sinful man, in order to pray for his own forgiveness, must come in penitence, cherishing that new purpose which enables him to say, “Father, forgive.”

Jesus added further, “If ye shall ask anything in my name, I will do it.” His name was to be used, not as a formal endorsement, or a graceful conclusion of the request. “The thought is not that of using the name of Jesus as a password or a talisman, but of entering into his person and appropriating his will, so that when we pray it shall be as though Jesus himself stood in God’s presence and made intercession.”<sup>1</sup> To pray in the name of Jesus is to pray in his spirit, and to pray for the things he would pray for.

And what did Jesus pray for in his recorded prayers? Not for wealth, ease, fame, personal pleasure, or even success, except along moral lines. The Lord’s Prayer contains but one petition for material blessing, and that modestly limits itself to asking one day’s bread for immediate need. The other five petitions are for the hallowing of God’s name, for the coming of his kingdom, for the doing of his will on earth, for forgiveness, and for deliverance from evil. This furnishes us what might be called the “norm” of appropriate petition. The model prayer moves chiefly in the realm of moral things, and all prayer offered in the spirit of Christ will lay the emphasis there.

We have Scriptural warrant for praying in regard to interests other than those directly spiritual, but always with an eye to the bearing of those benefits on the coming of his

<sup>1</sup> A. J. Gordon, *The Ministry of the Spirit*, p. 147.

kingdom in our hearts and in the world. The material advantages sought are subordinate to the spiritual benefits which stand as the supreme ends to be gained in prayer. Pray for health, for intelligence, for opportunities, for the success of legitimate plans, but always that in and through these you may the more perfectly glorify God as a useful servant of his holy will! To pray with this subordination of private interest to the larger demands of the coming kingdom is to pray in the name of Jesus Christ. This indicates that prayer must be ethical, and that it can only be effectively offered by those who are bringing their lives by personal consecration into right relations with the King of the kingdom. When it is thus offered, the hand of the petitioner is knocking at a door which opens on the treasure-house of the Unseen — and he may do it in the confident assurance that “to him that knocketh, it shall be opened.”









